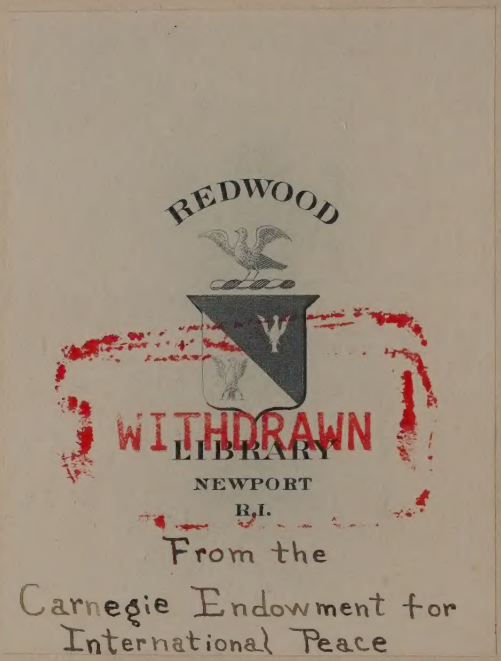

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JAMES BROWN SCOTT

DIRECTOR

The Conference of 1907

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FIRST COMMISSION

[3]

FIRST MEETING

JUNE 22, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4 o'clock.

His Excellency Mr. **Léon Bourgeois**, president of the First Commission, invites to sit with the Bureau the honorary presidents, his Excellency Mr. CAJETAN MÉREY VON KAPOS-MÉRE, his Excellency Sir EDWARD FRY and his Excellency Mr. RUY BARBOSA and the vice presidents, Mr. KRIEGE, his Excellency Mr. GUIDO POMPILJ and his Excellency Mr. GONZALO A. ESTEVA.

The **President** then delivers the following address:

GENTLEMEN: After a lapse of eight years, it is with a profound emotion that I resume the presidency of this "arbitration" commission to whose labors is due the Convention of July 29, 1899, for the pacific settlement of international disputes, the first of the three conventions included in the Final Act of the First Peace Conference.

Several of the most distinguished collaborators in our work of 1899 are, unfortunately, no longer here to prosecute that work with us: death has taken from our midst Mr. STAAL, the eminent president of the First Conference; Sir JULIAN PAUNCEFOTE, one of the initiators of the establishment of the Permanent Court, and Mr. HOLLS, to whose efforts is due in large part the institution of the international commissions of inquiry.

I am certain, gentlemen, that I shall meet with your approval in making a respectful and grateful reference to their memory. You will likewise join with me in the thought of gratitude which I owe to those of the members of the committee of examination of the arbitration convention, who, like Count NIGRA, like Mr. ODIER, and our excellent reporter BARON DESCAMPS cannot, for various reasons, be with us.

In recalling on this occasion the names of all these good workmen of the first hour, I am sure that I meet the wishes of their former collaborators—our excellent colleagues of the committee of 1899—Messrs. MARTENS, ASSER, LAMMASCH, ZORN, D'ESTOURNELLES DE CONSTANT, whom I see in our midst, whose experience and devotion the new Conference will again have at its [4] disposal, and whose good-will, whose conciliatory attitude and reciprocal harmony, so many times and so happily experienced in the course of our deliberations of 1899, shall again this year greatly contribute to the success of our labors.

Until 1899, gentlemen, international disputes were but accidentally settled through agencies of justice. In recognizing "the solidarity which unites the members of the society of civilized nations," and in including in Article 27 the

duty of the signatory Powers, "if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them," the Convention of July 29, 1899, has made of the pacific settlement of international disputes the necessary object, and as it were, the first object of this "Society of Nations."

According to Article 1, the Powers agree to use their efforts to insure the pacific settlement of differences. According to Article 16, they recommend arbitration "as the most effective, and at the same time the most equitable means for settling disputes which diplomacy has failed to settle."

In bringing together at the end of the Convention of 1899 the signatures of seventeen additional nations, the very recent Protocol of June 14, 1907, constitutes, it may be affirmed, the universal and definite consecration of these principles by the civilized world.

But the Conference of 1899 has done more than merely establish the principle of resort to justice; it has endeavored to facilitate such resort.

In the first place it recalls or proposes to the States the various means suitable for settling their differences in a pacific manner: *conciliation* by the principle of solidarity and through the agency of mediation or of good offices, *inquiry, arbitration.*

In the second place the Convention organizes the operation thereof, in providing for the practical application of these means.

Under the name of *Permanent Arbitration Court,* it constitutes a body of arbitrators, officially designated by their governments as being particularly capable and worthy of eventually fulfilling the office, and from among whom one may exercise the right of choosing one's judges, a right which is of the very essence of arbitral justice.

In the third place, the Convention of 1899 offers to the States in dispute a certain number of optional rules of procedure which, it is well known, have been carefully examined not only from the theoretical point of view of justice, but also from the practical and diplomatic point of view,—and which, it is well known, have been agreed upon not merely by jurisconsults, but by the great majority, and now by the unanimity of the States,—and which are thus presented with the official consecration resulting from their insertion into a convention duly ratified.

Whoever has had any experience with arbitration between nations is aware of the incidents, which, though unimportant in appearance, threaten, nevertheless, if not to stop, at least to delay the course of arbitral justice. In guaranteeing a procedure which assures a hearing to the parties interested, in guaranteeing the impartiality of the pleadings, the good order of the discussions and the faith of the proofs, the provisions of the Convention of 1899 enable the Powers easily to adjust these difficulties. The rules of procedure of 1899 are applicable
[5] only to those who voluntarily submit thereto. What greater praise could be bestowed upon them than in witnessing the happy disposition on the part of the pleaders to demand their application?

Finally, the Convention offers to the institution of arbitration a seat which has been accepted by all, and an installation which enables the international jurisdiction, whose corner stone we shall presently see placed, a palace which is

due to the generosity of Mr. ANDREW CARNEGIE, to whom, gentlemen, I wish to express our gratitude.

On April 9, 1901, in conformity with the terms of Article 26, paragraph 2, adopted upon the proposition of Mr. LOUIS RENAULT, all the States—even those which were not represented at the Conference—received the notification which, in fact, opens the court to all the nations.

Since that time, the normal life of the international institution is assured, and experience shows how, thanks to the new rules which have been established, the operation of arbitration may, day by day, become more practical and more simple. Permit me, at this moment, to offer thanks in this matter to the members of the Administrative Council, and, especially, to the distinguished General Secretaries who have succeeded one another: Baron MELVIL VAN LYNDEN, Mr. RUIJSSENAERS, and Baron MICHIELS VAN VERDUYNEN.

As a natural consequence of the organization of the recourse to arbitration and of the institution of the permanent court, the notion of international justice has entered into the realm of practical reality.

The opinion of the peoples quickly seized upon it, impatient to enjoy without delay its full realization, because great are the needs of equity to which the progress of civilization leads naturally. The legitimate foresight of the various governments has conformed thereto.

Hence the long list of permanent arbitration conventions, provided for somehow, as early as 1899, by Article 19 of the Convention: *general conventions,* upon which circumstances have sometimes still imposed certain precautions, and at other times permitted an unrestricted application; *special conventions,* having in view these or other special objects, such as the interpretation of commercial treaties, of social foresight, of common public works. In all, there are now thirty-three special treaties, duly notified, between States which declare that they obligate themselves henceforth to apply, in their mutual relations, as far as has seemed to them possible, the principle consecrated by the Convention of 1899.

This is not all. From an immediate practical point of view, the institution of commissions of inquiry and the provisions concerning arbitral tribunals have been able, in less than ten years, to justify their introduction into the modern law of nations.

In the course of the last war an unfortunate incident took place in the North Sea and occasioned material losses and losses of human lives. A serious conflict was to be feared between two of the greatest Powers of the world. The Convention of 1899 was appealed to and the conflict prevented by the recourse to a commission of inquiry.

The very existence of this agency of justice in positive international law, the suppleness of the provisions which established it, have enabled two great States, without the slightest injury to their national dignity, to obtain within scarcely five months the pacific settlement of a dispute which, in other times, might have led to the most serious consequences.

On the other hand, four arbitral awards have been rendered at The Hague in conformity with the Convention. No one has forgotten, gentlemen, the
[6] share that the American initiative has had in this matter, especially the initiative of President ROOSEVELT in putting the new jurisdiction into motion.

In 1902, arbitration between the United States and Mexico, in the so-called case of the Pious Fund of California;

In 1903, arbitration between Germany, Great Britain, Italy, Belgium, Spain, United States, France, Mexico, Norway, the Netherlands, Sweden, Venezuela, in the case of the preferential treatment of the creditors of the Venezuelan Government;

In 1905, arbitration between Japan and Germany, France, Great Britain, in the so-called Japanese House Tax case;

In 1905, likewise, arbitration between Great Britain and France in the so-called case of the Muscat dhows.

Within a few months these disputes were settled even though the history of arbitrations shows the slowness, the interruptions and untoward incidents formerly arising from the uncertainty of the procedure, and it will not be found bold in asking, if, without the Convention of 1899, it would have been possible, as in the Venezuelan case, to substitute the pacific use of a recourse to justice for the rigors of a naval action.

But it is not sufficient to record the results which have been obtained: it is our duty to envisage the future.

On the one hand, as in any human undertaking, the Convention of 1899 has its imperfections. On the other hand, its immediate practical consequences have had the most far reaching repercussions. It has enlightened the people; it has set the consciences into action; from the results already obtained there have been born new hopes and new needs.

Is it possible to perfect the agreements of 1899? Is it possible to render their action more frequent, more efficacious, more extended? Is it possible, according to the terms of the Final Act of the Conference, "to further strengthen the sentiment of international justice and to extend the empire of law"?

The circular communication of the Russian Government, dated April 3, 1906, has already indicated several ameliorations of which practice has demonstrated the utility, and of which the texts are susceptible.

Without considering the prepossessions which have arisen with regard to the mode of organization of the court itself, experience has led to the thought that for certain secondary disputes, of a more or less technical nature, in need of a simple, quick and uncostly settlement, the rules of 1899 might be usefully reduced to a sort of summary procedure.

As regards the commissions of inquiry, experience has likewise shown that the provisions of Part III would be advantageously completed by some general rules of procedure, easily applicable, to which might refer either the States in agreeing to their *compromis* of inquiry, or the investigating commissioners in the course of their mission.

The extension, either of arbitration, or, in a more general way, of the international jurisdiction to new objects is likewise, even at this present time, included in your program and submitted to your deliberations. The two
[7] propositions announced at the first plenary meeting of the Conference: the first by Baron MARSCHALL VON BIEBERSTEIN in regard to the matter of maritime prizes,[1] and the other by General PORTER in regard to the recovery of public debts by force,[2] have for their object, although from different view-

[1] Annex 88.
[2] Annex 48.

points and by different means, to extend the domain of international juridical institutions, and show the growing faith in which they are held.

It does not devolve upon your president to determine the field of your discussions and to foresee the further problems which may be submitted to you.

He cannot, however, help but recall the long and interesting discussions to which gave rise, in 1899, the question, In what cases, to what extent and under what conditions might the *obligation* of resorting to the arbitral procedure be accepted, either through special treaties or through more general conventions? It will certainly not fail of being again examined by you.

It will certainly not present itself in the terms in which it has already been solved in fact between certain of the States here represented: the arbitration treaties concluded between Italy and Denmark, between Denmark and the Netherlands and between Chile and the Argentine Republic contain, as you well know, the unrestricted clause of the obligatory recourse to arbitration. We all know that even as it is possible for two States, after thoughtful examination of their reciprocal situation, to consent separately to such a convention, even so it is impossible to extend the bond of an obligation so absolute to the totality of the nations.

But there will be those to remind us how, for objects rigorously determined, the *obligatory* recourse to arbitration was introduced in fact and very widely into international practice, owing to the signature of a large number of special treaties. The most of the States, if not all of them, acting separately, have accepted the obligation of resorting to arbitration for a certain class of disputes: either of a juridical order, such as the regulation of commercial or industrial societies, matters of private international law, civil or penal procedure, fixation of damages in case where responsibility is established; or in regard to the interpretation of treaties, provided that they jeopardize neither the vital interests, nor the independence or the honor of the States, nor the interests of third Powers.

Dr. Zorn, one of our most learned colleagues, said in 1899:

> When the Permanent Court shall be established and when it shall function, the opportune moment will come when, in virtue of special experience, it may be possible to enumerate certain cases of obligatory arbitration for all.

It may appear interesting to ask if the opportune moment has arrived and if it would not be of a considerable moral importance to consolidate by a common engagement the stipulations already concluded separately between the various nations and to consecrate by a common signature clauses in which the signatures of all of us appear already, in fact, for the most of them, two on the one side and two on the other.

It may, of course, be said that our engagements lack material sanctions, but to believe in their inefficacy would mean that we deny the power of the idea and the force which the universal conscience exercises more and more over the acts of the nations. And it surely is not here that such a discouraging thought would find an echo, surely not among these delegates of the nations who have come from all parts of the world to affirm their mutual confidence and their common hopes, and who have applauded the eloquent words by which our dear president Mr. Nelidow invited us to march toward "the luminous star of universal Peace and of Justice."

[8] Gentlemen, your president excuses himself for having held your attention

so long. In detailing the various problems that have been or may be set before you, it has not been his intention to indicate his preference for any of the possible solutions. Together with you, he has confined himself to survey the field whose limits we shall have to determine, and the methods of exploring that field. As for himself, he can but repeat now what he said, eight years ago, upon inaugurating the labors of your predecessors: We have this good fortune, that there can be no division between us as to the general ideas from which our work is to proceed. We are assured of starting together in one direction and on a common road: It will be the duty of your president to set as far away as possible upon this road the point up to which we shall pursue our path together. (*Applause.*)

The **President** invites the delegates who might have propositions to lay before the First Commission to hand in their texts as soon as possible.

His Excellency Baron **Marschall von Bieberstein** presents, in the name of the German delegation:

1. A proposition concerning the jurisdiction of prizes.[1]

2. A draft of three new articles to be added to the Convention for the pacific settlement of international disputes of 1899.[2]

His Excellency Sir **Edward Fry** likewise presents a draft relative to the organization of a permanent court in matters of maritime prizes.[3]

His Excellency Mr. **de la Barra,** makes the following declaration, in the name of the Mexican delegation:

The Mexican delegation, desiring to contribute to the study of the first point of the program of the Second Peace Conference, has the honor of presenting to the Commission the text of the obligatory arbitration treaty whose object it is to settle the disputes arising exclusively from claims for damages and losses introduced by the nationals of the contracting parties, a treaty which was signed at Mexico, on January 30, 1902, by the plenipotentiaries of seventeen American States and extended to December 31, 1912, by all the nations represented at the Rio de Janeiro Conference.

The same respect for justice, the same love for peace, the same aspirations toward the progress of humanity which led to the agreements of the First Hague Conference, inspired likewise the conventions of the Mexico Pan American Conference. These sentiments manifested themslves in a very special manner in the arbitration treaty which realized one of the noblest aspirations enunciated by the Russian delegation in the explanatory note of Article 10 of the draft arbitration convention at the Conference of 1899. This initiative could not then become an international convention, but it was certainly not, for that reason, without effect. Like the seed carried by the wind, which germinates in distant regions, it crossed the ocean and came to fruition on our continent.

The Mexican delegation, at the Conference of 1902, had the honor of presenting a draft for a convention which served as basis for the deliberations upon the obligatory arbitration treaty, adopted after long and animated discussions; this treaty, whose text I shall have the honor of laying before your Bureau, advanced in actual practice the principle of the pacific settlement of inter-

[1] Annex 88.
[2] Annex 8.
[3] Annex 90.

[9] national controversies, as has been so authoritatively stated by Baron d'Estournelles de Constant in the remarkable study which he has published upon the subject of the political progress of our foreign relations.

The general eagerness with which this initiative was approved; the fact that the treaty mentioned above has been ratified by several of the States which had approved it (the United States and Mexico, among others), and finally the unanimous vote of the nations represented at the Rio de Janeiro Conference to the end of extending its validity until 1912, are so many eloquent proofs of the progress, slow but sure, which has been secured through the adoption in positive law of the rational settlements which science counsels and which politics admits.

In interpreting the first article of the treaty, the Rio de Janeiro Conference has recognized that recourse to diplomatic channels must be had only after all legal recourses have been exhausted.

This treaty brings together also the wishes of all the American States, of those which are partisans of general arbitration applicable to all causes and under all conditions, as well as of those which exclude from its range of action those questions affecting the national dignity or their vital interests.

The differences which may be submitted to arbitration, in accordance with the treaty of Mexico, are such as are in no way related to those political or social questions which so frequently rouse the passions of the peoples, or which directly affect their basic interests. Ordinarily they assume a juridical form which lends itself to exact settlements which avoid the untoward and frequent causes of disagreements between friendly nations.

The Mexican Government, which does not allow itself to be carried away either by an unjustifiable pessimism or by a deceptive optimism, accepts the principle of arbitration, but is of the belief that in the present conditions of international society, questions pertaining to the honor and to the independence of the States must not be included in the language of action of this institution. It has accepted arbitration in its treaties, it has loyally fulfilled its engagements. No one is ignorant of the fact that the first litigation which the arbitration court of this city had to judge was submitted to it by the United States and Mexico.

The Mexican delegation has the honor of presenting respectfully the treaty in question, with the hope that this work of justice and of concord of the young American republics will show to the other nations the practical spirit with which they labor in order to attain the realization of the grand idea which brought inspiration to the First Peace Conference: "to extend the empire of law and to strengthen the appreciation of international justice."

It is to be hoped that from this illustrious assembly there will go forth results even more fecund, which, as has been stated by the Institute of International Law, "may meet with the approval of the juridical conscience of the civilized world." (*Applause.*)

At the close of his address, his Excellency Mr. de la Barra presents the text of the Mexican treaty.[1]

Baron **d'Estournelles de Constant** presents two drafts in the name of the French delegation, the first being intended as a substitute for Part III of the Convention of 1899 for the pacific settlement of international disputes (Articles

[1] Annex 60.

9 to 14 concerning the commissions of inquiry); the other concerning certain simplifications of that same Convention and a summary arbitration procedure.[1]

His Excellency General **Porter** announces, in the name of the United States of America, a proposition whose object is to forbid the use of force for the collecting of debts, before recourse has been had to arbitration.[2]

[10] His Excellency Mr. **Martens** requests that the right to present amendments or drafts in the course of the discussions be left entirely with each delegation.

The **President** recalls the liberal jurisprudence of the First Conference and states that the like will prevail in 1907: each member may hand in propositions whenever he deems it expedient.

He makes the further observation that the drafts which have just been presented by the delegates of Germany, of Great Britain, of Mexico, of France and of the United States of America can be filed under two different classes of ideas. It would therefore be logical to apportion the labors of the First Commission among two subcommissions.

The first should examine the modifications to be made in the Convention for the pacific settlement of international disputes, and among other things—according to a remark of his Excellency Sir EDWARD FRY—should examine the question of the international commissions of inquiry.

The second should study the questions concerning maritime prizes.

Two lists will be available on which, according to their preferences, the members of the Commission may have themselves registered. (*Approval.*)

The PRESIDENT reserves to himself the privilege of presiding over the two subcommissions in order to ensure the unity of their labors. (*Applause.*)

He proposes, at the same time, that each subcommission should designate a special president whose duty it shall be to take his place in case of necessity. As regards the fixation of the date of the next plenary meeting of the Commission, this shall be communicated through the office of the secretariat.

The meeting closes at 4:45 o'clock.

[1] Annexes 1 and 9.
[2] Annex 48.

[11]

SECOND MEETING

SEPTEMBER 10, 1907

His Excellency Mr. Léon Bourgeois presiding.

The meeting opens at 10:15 o'clock.

The minutes of the first meeting are adopted.

The program of the day calls for the discussion of the Report of Mr. Louis Renault, concerning the labors of the second subcommission.[1]

The **President** expresses himself as follows: I should feel at greater ease, gentlemen, if I did not belong to the same delegation as the honorable Reporter, in order to assure him in the name of you all of the thanks and of the praises of the Commission. The report which is now laid before you is not merely a clear exposition of your deliberations, but it presents the character of a profound study of the question which may serve as a perpetual commentary to the texts which are laid before you. It will also constitute a veritable monument which, we hope, you will decide is a perfect work. (*Applause.*)

Mr. **Renault** requests to be heard in order to state that it is owing to the useful and hearty collaboration of the authors of the project, Messrs. Crowe and Kriege, that he was enabled to coordinate the elements of the German and English texts into a common accord. He requests the Commission to include them in the praises of the president, of which they deserve the greater share, and, on his own part, he congratulates himself and feels honored to have been able to work with them. (*Applause.*)

The **President** believes that the Commission will probably not find it necessary that the report should be read in full and proposes to proceed to the general discussion of the draft Convention relative to the establishment of an International Prize Court. (*Approval.*) His Excellency Mr. **Ruy Barbosa** expresses himself as follows:

We have applied ourselves with the most earnest and with the most sympathetic attention to the study of this project, in fathoming it in all its parts as may be seen from our minutes of the meetings of July 4 and 11, of the
[12] second subcommission of this Commission as well as of those of August 12 and 17, of the committee of examination. We have welcomed the institution of a prize court; we have only regretted that its scope has not been enlarged by including in it also the first instance, instead of confining it to the appeal. We have been among the first to ask that this creation have the character of permanence, a counsel which ended by triumphing over the contrary opinion. We have even openly declared ourselves for the principle of classification between the States, a conclusion we reached in virtue of the consideration that, in matters of prizes, the international justice to be created affects only the

[1] See vol. i, sixth plenary meeting, annex D.

maritime interests of the States, whose representation in this court should, therefore, be graduated in proportion to their situation on the sea.

But for the very reason that we were absolutely in accord with the project relating to the necessity of that principle, we could not approve the use which it has made of it. When one is about to impose a classification upon entities, not merely free, but sovereign, it is necessary, in order to look forward to their consent, first to convince them of the impartiality and of the correctness with which such classification has been proceeded with. It was the more necessary in the present case because it was the first time that an official international classification between independent nations was undertaken, and it would not be reasonable to hope for their consent for some to be placed below others in a scale of values, unless each of these nations should clearly realize the rigorous justice of such classification.

It is a fact that this has not been done, as we have shown in great detail by figures which might be rectified as to some points but which nevertheless remain conclusive in their generality.[1]

Three measures were to be applied: the value of the merchant marine, the value of the maritime commerce and the value of the war navy. We have tried all three, by showing that, for different States, especially American States, and among these Brazil, justice has not been realized, nay, that it was subverted with palpable inexactitude.

As regards in particular the country which I have the honor of representing, we have put in evidence the inequity committed in regard to the importance of its merchant marine as compared with that of other favored States. It will suffice for the present to recall that, though classed in the fifth category, Brazil beholds ahead of her, in the fourth category, three States, indicated by us, whose merchant marine, in one case, is but half the size of ours, and in the two other cases, does not even reach this proportion.

As regards the maritime commerce of the nine States ranked in the fourth class, there are but two, Sweden and Belgium, which are actually superior to us. The rest, to the number of seven, present in this respect, as compared with Brazil, a considerable inferiority. Our maritime commerce is almost double that of one of these nations; it is double that of another; it is three times that of two which follow immediately; it is four times larger than that of two others; and, as compared with that of the last, it is nineteen times larger. Yet, Brazil has been entered by the Prize Court below all these seven States, even below the last, whose maritime commerce represents but one-nineteenth part of ours.

Finally, we have endeavored to find out if, at least with regard to the
[13] war navy, the distribution of the project was just. But we have reached exactly the same conclusion. Of the nine States which have been put into the fourth category, whilst Brazil finds herself placed in the fifth, one of them has no war navy whatever, another has only just enough of such a

[1] We have received from his Excellency the Ambassador from China, a rectification which we wish to report here, as soon as we find an opportunity to do so, after his letter of the third instant. According to the data which he therein presents, the total of Chinese tonnage amounts, at this time, to 43,023 tons. We make acknowledgment to his Excellency of this fact, by remarking, nevertheless, that according to our declaration, our information was secured from the *Statesman's Year-Book* of the present year, which is one of the most authoritative sources.

navy for the defense of its sea coast, and the last States (with the exception of China) have, in the matter of a war navy, only twenty-two thousand, fifteen thousand, fourteen thousand, thirteen thousand, seven thousand, and two thousand tons, whilst Brazil has a tonnage of more than thirty-nine thousand. Nevertheless, all these States have been raised to the fourth class, while at the same time Brazil has been put into the fifth.

It seems to us that this is altogether arbitrary.

When on August 17, we presented our first criticism with regard to the importance of the merchant marine, measured by its tonnage, one of our distinguished colleagues made answer to me in the committee of examination that the authors of the table had decided "to take into account, not only the tonnage, but also the importance of the navy as well as of that of commerce." To this declaration we replied by proving during the following meeting, that in view of these two other measures, the injustice of the classification with regard to Brazil becomes even more flagrant.

No opposition was shown to this statement; no reply was made. But the manifest injustice, the proven and tangible inversion have been maintained. This palpable inequity at the base of a judicial institution, this evident affirmation of the power of force against reason in the work of the most august assembly in the world which has been convoked in order to organize peace through the means of justice, is infinitely painful for the victims.

Our country cannot resign itself to that situation. Our Government could not subscribe to it without offending public opinion which has already manifested itself in this matter, and practicing an unnecessarily temerous act which would meet with most certain opposition and with the most peremptory refusal of our legislators.

Our vote will therefore be against the project. In so voting we appeal to the times when the spirit of the peoples shall be more mature for the work of peace which is but that of right sincerely observed between the nations.

His Excellency Mr. **Esteva**: The Mexican delegation declared in the committee of examination that, in view of the instructions from its Government, it voted against the draft Convention relative to the establishment of an International Prize Court. However, moved by the desire to contribute to the work of concord of this Conference, it has requested further instructions from its Government, by transmitting to it the modifications introduced into the original project, and especially the text of Article 16.

While awaiting these instructions, the Mexican delegation will this day abstain from voting. It will give its final vote in the plenary meeting of the Conference.

His Excellency Mr. **Larreta**: The delegation of the Argentine Republic will unreservedly vote for the project elaborated by the committee of examination, but we must, first of all, state the reasons for our acquiescence.

We believe that the prize court will constitute an important progress, for the two-fold fact that, so to speak, it will superpose decisions of an impartial tribunal on the more or less interested decisions of the belligerents, and furthermore, it will be the first international jurisdiction created by the civilized world. Let me add that, in our judgment, the functioning of such a court becomes, at this time, not only a desirable progress, but an indispensable institution.

The Conference is preparing to establish the legislation for maritime war-

fare, after having recognized and determined some points of contact, that is
[14] to say, the principles and interests which, in this respect, are common to all the civilized peoples. I know full well that we shall not advance much further on the way which is open to us. Even as we are not dreaming of modifying our warlike civilization within a fortnight, so shall we not draft the final code of maritime warfare in the course of this Conference. But the principles which will be established will none the less mean a marked progress upon those of the Paris Congress which still rule in this matter.

It is certain that every legislation demands a tribunal that shall apply it, if I may be permitted to summarize in this phrase the eloquent address of his Excellency Mr. Bourgeois upon obligatory arbitration. On the other hand, the inverse proposition is not less true; every tribunal has need to find support in a precise legislation. This is the reason why I venture to predict that once the prize court has been created, all the signatory States will endeavor to come to an understanding in order to complete the legislation for maritime warfare and to fill in its gaps.

I have nothing to add upon this question, especially not after the exposition made before the Commission by its eminent reporter. But not losing sight of the fact that for the committee of examination, the great difficulty consisted in the mode of organization of the tribunal, I desire to formulate some declarations with regard to this subject.

When we were considering the permanent arbitration court, my colleague, his Excellency Mr. Sáenz Peña, declared that in his judgment the best basis of representation was found for each country in the total of its foreign commerce. We do believe, indeed, that we find therein a distinct criterion, that there is no better one by which to appreciate from the international point of view, the comparative capacity of the States. But we know also that this criterion is not mathematically exact, and that it is not of an absolute nature. In reality, any statistics are inexact, both because of the imperfection of the processes resorted to and because of the patriotic sentiment which urges authors to raise the figures in favor of their country. Therefore, in attempting to determine the representative coefficient of each nation, it would be proper to complete the data of the foreign commerce regarded as a basis, by those of the population, of the military and naval power, of the extent of the maritime coasts and of the territorial frontiers, not merely of the country itself, but of all neighboring countries; in short by all the material and moral elements which develop or restrict the relative influence of nations.

For the time being, and as an approximate solution it would be enough, according to the statements of his Excellency Mr. Lammasch, in elaborating the present project, to take into consideration, apart from the figures representative of foreign commerce, the tonnage of merchant vessels and the importance of war vessels. We accept the position assigned to the Argentine Republic in the table of apportionment of judges, not only because we believe in the good faith which determined it and which, in fact, approaches the truth, but also because we have looked upon the project less in the light of a problem of arithmetic than as an institution of confidence and of harmony. (*Applause.*)

It may be that the Argentine Republic is entitled to a higher rank. We are at present the greatest exporters of cereals in the entire world. Our yearly commerce of exportation is at the rate of over 500 frs. per capita, the highest known

figure; finally, our war navy exceeds 80,000 tons, which is a great deal for a State of the South American continent. But even in admitting that some error may have slipped into the appreciation of our relative importance and that we are entitled to a slightly longer representation than that which has been assigned to us, we are yet willing to make this small sacrifice as a homage to this great work of right and of justice. (*Applause.*)

But, gentlemen, patriotism is even stronger than the love for peace, and it is quite evident that in examining this project, we have not for one [15] minute lost sight of the interests of our country. In my judgment, these interests have been fully safeguarded by the Swedish proposition which has been adopted by the committee of examination. Each belligerent will always have a judge. This satisfies us, for if the Argentine Republic were drawn into a war, if such a great misfortune were to come upon my country, we would hold the same situation in the Prize Court as the other belligerent; before right and justice we would all be equals, I mean, we would be of an equality inseparable from sovereignty.

And now that I have uttered that word, permit me to add that in spontaneously accepting this convention, we shall in the most emphatic manner exercise that unrestricted sovereignty which is the share of the Argentine Republic. It is because of this that we have come here; we have come here to collaborate, without humility and without pride in the work of universal justice. I say without humility and without pride, for while we deeply appreciate the honor of sitting in this assembly, we have, on the other hand, through our presence here, given to it the luster and the force of a world assembly. (*Applause.*)

His Excellency, Mr. **Tcharykow**: The Russian delegation, in referring to the declarations which it had the honor of making in the sitting of July 11 last, of the second subcommission of this Commission, and in view of the fact that a conventional agreement with regard to certain questions of international maritime law whose regulation should serve as a basis to the decisions of an international prize jurisdiction is still far from being complete, reserves the judgment and the decision of the Imperial Government as to the whole, to certain special stipulations and especially to those of Article 7 of the draft Convention relative to the establishment of an international prize court which has now been laid before this Commission.

His Excellency Mr. **von Mérey**: At the last meeting of the second subcommission, I had the honor to state that the Austro-Hungarian delegation had been entirely won over to the principle of the establishment of an international jurisdiction in matter of prizes. At that time we found ourselves in the presence of two different propositions, of which one had been presented by the German delegation, and the other by the British. I then expressed a hope that these two delegations would succeed in removing, by mutual concessions, the differences which existed between their propositions.

This hope has been fully realized. Thanks to their conciliatory spirit and aided in their agreement by the precious assistance of our colleagues from the United States and from France, the German and British delegations have agreed upon a common project which, in the name of these four delegations, has been laid before our committee of examination.

I want to congratulate the authors of this project upon the result of their collective and harmonious labors, and to declare, at the same time, that the

Austro-Hungarian delegation accepts unreservedly the whole of this proposition.

His Excellency Mr. **Beldiman**: In the name of the Roumanian delegation, I have the honor of presenting the following statement:

We believe that the project of a convention relative to the establishment of an international prize court, as elaborated by the committee of examination of the second subcommission, will, if adopted by the Conference, constitute a very considerable progress in one of the most difficult matters of international law. It is a rare, if not perhaps the first case where "the Governments," as has been so well stated by our eminent reporter, "have realized that which doctrine had not dared hope for."

[16] It is proper, therefore, to examine with great care in order to see if the criticizable point of this project—the only one which, in our judgment, is of a nature to raise serious objections—might justify the rejection of an international institution which in exceptionally grave circumstances is intended to render real and great service to all the nations which might adopt it.

But, above all, it is necessary to establish the fundamental difference existing between the international prize court in the form in which it is now submitted to our discussions, and the properly so-called *arbitral* justice. The latter rests upon the free selection of judges by the States which decide to submit their controversy to arbitration; and it is precisely this freedom of sovereign States to constitute, by a common accord and for each case, the court to which they entrust the judgment of their dispute—it is this full freedom which is *the very essence of international arbitration*. On the other hand, the Prize Court will be an international tribunal organized in advance with judges irremovable for the duration of their appointment, and intended to act, in exceptional and well determined circumstances, upon the decisions of the national courts of each contracting State. For this reason international arbitration requires, for each case submitted, a special *compromis*, whilst in the prize jurisdiction which has been proposed, the Governments or the interested private parties will directly apply to the court which it has been proposed to establish.

It is, therefore, necessary carefully to determine this *essential* distinction between *arbitral* justice and the new international court that is to be created; and this distinction seems to us the more indispensable because a large part of the difficulties arising from the various propositions regarding international arbitration come from the involuntary confusion frequently resulting from these two very different kinds of international jurisdiction.

This distinction of principle having been established, it is nevertheless necessary to recognize that the composition of the international prize court and the effective apportionment of the judges leave much to be desired from the point of view of the principle of the equality of sovereign States in matters of international law. But the inconveniences that might result therefrom could not possibly be compared to those that would be inherent in the analogous constitution of a permanent *arbitration* court.

The prize court is called upon to act as a judicial, and not as an arbitral court, upon cases of a very special and well determined nature. The permanent arbitration court, on the contrary, would be competent to act upon all sorts of international controversies not fixed in advance.

Because of these considerations, and while reserving to our Government the right of examining whether or not it may avail itself of the provisions pro-

vided for by Article 15, in order not to derogate from the principle enunciated hereinbefore, of the equality of sovereign States, the Roumanian delegation will vote for the adoption of the project, desirous of associating itself with this great work which will be a milestone in the annals of international law.

His Excellency Mr. **Hagerup**: In the committee of examination, I have already had occasion to declare that the Norwegian Government accepts the proposition submitted to the Commission. I want to repeat that declaration here, and to add thereto a few observations of a general character.

If we accept the project presented by four great Powers it does not mean that we find no objection to the manner in which the court has been composed. If we had been engaged in the consideration of an international tribunal, intended to decide controversies of all kinds, a tribunal truly as general as international, there would have been, according to the judgment of my Government, a decisive objection in the fact that this composition does not satisfy the necessary consequences of this fundamental principle of international
[17] law, to the effect that from the point of view of law, all the sovereign States are equal.

But, as we are at present considering the establishment of a tribunal intended solely to safeguard a certain class of special interests, there would be no violation of this fundamental principle if, in the first place, in the matter of the composition of the court, we gave consideration to the importance of the interests that are at stake. From this point of view, the original British proposition which regulated the composition of the court purely on the basis of the tonnage of the merchant marines, had great advantages for the small States possessing a large merchant marine. But, not having seemed acceptable, either to all the great Powers, or to the small States, which, according to the principle adopted, would be excluded from any participation in the new international jurisdiction, this system has been replaced by another in which, on the one hand, preponderance has been given the eight Great Powers, and on the other hand an effort has been made to find a place for all the States, even for those that have no merchant marine. It is evident that this system easily lends itself to criticism, and that all the States cannot be satisfied with the rank which has been accorded them in the list of judges. If one were to judge of the correctness of the claims which the different States may have to representation in the court according to their maritime interests, I believe that no State could have stronger reasons than Norway to complain because higher rank has not been assigned her in the list of judges. I make free, in this respect, to call attention to the fact that, according to English measurement, the tonnage of the Norwegian merchant marine is approximately three million tons of sailing vessels, or about one million four hundred thousand tons of steam vessels. This means that, among the eight Powers which are always appointed to sit in the court, there are but three—Great Britain, Germany, and the United States of America—which have a merchant marine greater than that of Norway, that the tonnage of the latter is greater than the total tonnage of the two privileged countries which follow immediately in the list after the Great Powers and that it exceeds one-third of the total tonnage of the Powers that figure in the same group as Norway. Unfortunately no statistics are available to inform us in what measure the Norwegian marine has been exposed to the dangers and to the uncertainties for neutral navigation that are the inevitable consequence of maritime wars.

But as a large part of our tonnage is engaged in regions which have been the scene of such wars and has been chartered for the transportation of cargoes which have led to discussions as to whether or not these cargoes should be treated as contraband of war, I doubt, if—with the exception of the very great maritime Powers already referred to—there is another State whose maritime interests have been more greatly affected by the recent wars than those of Norway. But it is because of these interests precisely that Norway has for a long time wished to see the idea of an international prize jurisdiction realized, a jurisdiction at once truly independent and impartial; and already on the receipt of the Russian program of this Conference, the Norwegian Government expressed the desire to have the question of such a jurisdiction included in this program. In thus acting, it has nevertheless borne in mind that perfection lies not within the scope of human activity, and, therefore, not within the scope of the Peace Conference, that any system that might be invented with regard to the composition of the court will give rise to criticism, and that—as is so well stated in the report which we have before our eyes—the commercial interests of a small neutral State will, in any case, be more efficaciously guaranteed by the functioning of an international jurisdiction, though imperfect, than if such
[18] a State were solely relying upon the impartiality of the Prize Court of the captor or upon the outcome of a diplomatic claim. It has likewise taken into account the fact embodied in the same report, that if the Powers that will more generally appear in the rôle of belligerents are willing that the decisions of their prize courts may be revised by an international jurisdiction, this will be on their part, within a certain measure, a sacrifice, and that, according to the ordinary course of human affairs, one should be prepared that in exchange for this sacrifice, they should demand a privileged situation as regards the designation of the judges. The Norwegian Government has therefore expected that adhesion to the new institution would demand on its part a certain resignation, and it is ready to give proof thereof in the interest of this important reform.

Those who have followed the discussions to which the question of an international prize jurisdiction has given rise, will appreciate the value of the fact that this reform may be realized from this time on. In this connection I venture to recall some facts that seem to me worthy of interest. The Institute of International Law has considered this question for a long time and has even elaborated a regulation by which, as has been stated by the first German delegate, the German project was inspired. But in the course of those discussions, several of the most distinguished members of the Institute stated that the latter engaged in useless work in the pursuit of Utopias, because a sovereign State would never consent to submit a decision respecting the conduct of its marine officers to an authority independent of its sovereignty. At the Christiania meeting, in 1905, of the Association of International Law, a resolution was proposed in favor of an international prize jurisdiction; but the assembly did not consider the resolution because of the objection, raised in particular by the English members, that the time was not yet ripe for the realization of these ideas. These are facts which give to the project proposed by four great Powers, among them the greatest maritime Power of the world, an interest which is, so to say, ideal, apart from the real and practical interest of the institution itself which it means to create. This is a testimony of the progress of ideas which I take the liberty of commending to the attention of

those who think that the matter of one year more or less in the turn of the judges is a capital matter; nor is this testimony perhaps unworthy of the attention of those who think that this Conference has furnished no proof of the progress of the idea of a reign of right and of justice between the peoples.

His Excellency Mr. **Hammarskjöld:** In the meeting of July 11, I thought I was warranted in stating that the German delegation was not absolutely opposed to the constitution of a permanent prize court as proposed by the British delegation, and that this fact seemed to point out the course which it was necessary to follow in order to reach an agreement with regard to the different opinions.

The hope which I then expressed is now realized.

I do not disregard the importance of the objections that have been presented with regard to the organization of the proposed court, especially in respect of the apportionment of the active judges. Yet, the arguments appealed to in this matter lend themselves at times to criticism; as an illustration of this, let me state that the Swedish war navy amounts to more than *three times* the tonnage indicated in the last meeting of the committee and here repeated. At all events, the objections raised or to be raised are not, in my judgment, decisive. We are considering a new institution from which we hope for the greatest practical advantages, and this institution seems to be of too distinct a character to compromise, by its organization, the principle of the equality of sovereign States, a principle which, I am certain, no one would think of attacking.

I shall therefore be happy in supporting by an affirmative vote the very important proposition which is before us.

[19] His Excellency Mr. **Cléon Rizo Rangabé** makes the following statement:

The Royal Hellenic delegation, recognizing the great importance inherent in the establishment of an international prize court, and the manifold advantages which, no doubt, will result therefrom, will vote in favor of the draft Convention in relation thereto.

In considering that the modalities, under which this institution is presented, being of a special nature, bear no prejudice to the fundamental principle of the absolute juridical equality of sovereign States, it is brought over to this result.

Nevertheless, I request that this vote be regarded as provisional, in view of the fact that the Royal Government did but yesterday call for certain explanations in regard to certain articles of the project, explanations which we hastened to furnish and with regard to which we are still without an answer.

His Excellency Mr. **van den Heuvel:** Desiring to associate itself with any measure extending the benefits of an impartial justice, the Belgian delegation will give its adhesion to the project concerning the prize court.

In conformity with the Convention of 1899, juridical disputes arising between equally sovereign States call for solution arbitrators freely and equally designated by the parties interested. The Belgian delegation is opposed to the organization of any institution having for its object the substitution in their place of permanent judges who would not, in each case, be chosen by the parties interested.

The present project deals with an essentially different domain. It aims to provide precious guarantees in the judgment of contestations which are nearly always of a private nature, and which, in virtue of the international law of customs, are nowadays submitted to national prize tribunals.

In the place of this particular jurisdiction, instituted by the captor, to which

the neutral and the belligerent opponent are subject and which decides in the last instance, the new provisions superpose a court of appeals. This superior institution is to judge in accordance with the conventional law, according to international law and according to equity. It is so composed as to give to property and to commerce the assurance of an efficacious and constant protection.

Within the field of the regulation of maritime warfare this is a most happy reform. Its importance will be great as long as no recognition has been given to these two great future principles: the inviolability of private property on the seas and the suppression of contraband.

Mr. **Corragioni d'Orelli:** In the name of the Siamese delegation, I should like to make a statement similar to that of his Excellency the first delegate from Greece. Not having, up to this time, received positive instructions from our Government, we must request the Commission to regard the affirmative vote which we shall be happy to cast this day in favor of the project as provisional.

We reserve the right to give our final vote when the plenary meeting shall consider this project, a vote which, moreover, I have reason to believe, will also be affirmative.

His Excellency Mr. **Tsudzuki:** In the presence of the revised project of a convention relative to the international prize court, the Japanese delegation considers it its duty to renew its high sentiments of esteem and of profound sympathy for the exalted principles of justice and of equity which have inspired the project. Likewise, it feels it to be its duty to express its most sincere thanks to all who have assiduously applied themselves in contributing to the elaboration of the definitive project which is before us, and which not only harmonizes the diverging views of the two original propositions, but constitutes a great
[20] progress from the view-point of the clearness of provisions, of the facility of functioning and of the practical usefulness of the institution in question.

In presenting its homage to the distinguished minds that have inspired the countries whose delegations have taken the initiative in this matter, and to the spirit of conciliation of those who have aided in reaching an agreement with regard to the means for the practical realization of these fundamental principles of justice and of equity, the Japanese delegation hopes, nevertheless, that it may be permitted to observe that, the subject being of great importance and of a nature that will have a great bearing upon the internal legislation and upon the international rights and duties of a State, it will not be deemed unreasonable to request that the project may be subjected to an attentive and scrupulous examination in all its relations with the political activities and with the circumstances which are now surrounding each of the nations, before these be obliged to express their final decision upon the matter.

In consequence:

Whereas the establishment of an international prize court is not expressly mentioned in the program of the present Conference;

Whereas the jurisdiction which it is proposed to give to the court is far reaching, and even of such a nature as may impose a serious limitation upon the sovereign rights of the States;

Whereas, furthermore, the question is an entirely new one and has not yet been subjected to a profound examination and to an analysis such as behoove its importance;

The Japanese delegation considers it its duty to reserve its decision upon the subject in order that its Government may study the question in all its bearings upon the present condition of its country and decide, on the basis of a thorough and minute understanding of the facts, if the jurisdiction and the organization of the tribunal as proposed, would be, in its judgment, of such a nature as to contribute to world harmony and to decrease international complications and misunderstandings, without at the same time causing to it too serious inconveniences to make the matter acceptable.

In these circumstances, the Japanese delegation abstains from voting upon the matter.

His Excellency **Turkhan Pasha** declares his inability to vote in favor of the project.

His Excellency Mr. **Fortoul**: Upon the entire project of a convention relative to the establishment of an international prize court, I beg to be permitted to renew the declaration of principles which the Venezuelan delegation presented in the meeting of August 3 of our first subcommission, at the time when we were considering the American proposition concerning a permanent arbitration court. The Venezuelan delegation declared on that occasion that, since the Second Peace Conference is a universal assembly, its task consists in establishing principles that may be universally recognized, and in establishing institutions which, on the basis of an absolute equality, will guarantee the interests which each State deems essential to its sovereignty.

After the prolonged discussions of the committee of examination, it would be superfluous again to develop now a doctrine which may be regarded as accepted by the juridical conscience of the entire world, and which, moreover, has been expressly admitted at the time of the convocation of the Second Conference and again on the opening of its labors. But this doctrine comes this day once more before the First Commission, if not entirely disowned, at least profoundly transferred by the project of an international prize court. In the first place, the title itself of international court, which seems to refer to a juridical organ constituted by the equal representation of all the States, loses subsequently this world character, when the project of the committee of
[21] examination endeavors to determine the organization of the court, by establishing an apportionment, which seems to us arbitrary, in the appointment of the judges. In part II, this project appears indeed like a sort of *compromis* by which a majority of the States sanctions a privileged position of a group of other States, which see the advantages accruing to them at this time from the number of their vessels and the power of their armies, further increased by the prerogative of judging in the last instance on questions of right and of equity.

Believing that the project of the committee of examination is in evident contradiction with the principle of equal representation of the States, the Venezuelan delegation declares that it will abstain from voting upon the whole of this project as it has been drafted, while at the same time in favor of the desideratum of a really universal court.

His Excellency Mr. **Milovanovitch**: In voting in favor of the project relative to the establishment of an international prize court, the Serbian delegation believes that it is not superfluous to state expressly that, as has been so well stated by the first Roumanian delegate, there can be no analogy between this

court and the permanent arbitration court, and that, therefore, the acceptance without reserve of the principle of the unequal representation of the States in this court, will in no way prevent it from fully affirming its point of view that, in an arbitral court intended to judge of the sovereign acts of the States, all the States must be on an equal footing.

His Excellency Mr. **Gana**: The Chilian delegation is not in possession of sufficiently precise instructions from its Government to enable it to cast its final vote upon the question.

We can add that we recognize, in its full extent, the great importance which the international prize court will have from the point of view of international justice and harmony; but, at the same time, there are in the organization of this court certain delicate points deserving of more careful examination.

For this reason, the Chilian delegation feels that it is its duty to abstain from voting until its Government shall have expressed itself in a definitive manner upon this matter.

His Excellency Mr. **Lou Tseng-tsiang**: In a spirit of conciliation and of understanding, the Chinese delegation will vote in favor of the project for the establishment of an international prize court, reserving, however, its action on Article 15.

His Excellency **Samad Khan Momtas-es-Saltaneh**: For the time being I abstain from voting upon the project for the convention relative to the establishment of an international prize court.

This abstention is due to the lack of instructions upon this matter. I am, however, happy to state now that I have warmly commended to my Government the principle developed in the project which is before us, a principle conformable to the ideas of justice and of equity. I shall, therefore, cast a final vote in the plenary meeting.

His Excellency Baron **Marschall von Bieberstein** proposes that the articles of the project should not be voted upon separately but collectively.

After an exchange of views between Messrs. **Asser, Renault,** and the **President,** the commission decides, in the first place, to discuss separately the articles with regard to which observations might be made, and then to put the whole of the project to a vote.[1]

[22] The **President** reads the articles aloud.

PART I.—General Provisions

Article 1

The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved.

Article 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Article 3

The judgments of national prize courts may be brought before the International Prize Court:

[1] Annex 93.

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to:

(*a*) Cargo on board a neutral ship;

(*b*) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(*c*) A claim based upon the allegation that the seizure has been effected in violation either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

ARTICLE 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2*b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b*.

[23] His Excellency Mr. **Asser** believes that in order to avoid all uncertainty in this respect, it is desirable to record either by an express provision, or by an explanation in the report, that it is the court itself which decides as to the admissibility of the appeal, in case of contention upon this point. The capturing State must not be able to evade the execution of the court's award under the pretext that it did not come within one of the cases mentioned in Article 3, and that, therefore, the appeal to the international court was not admissible.

Mr. **Renault** declares that at bottom there is no disagreement between his Excellency Mr. ASSER and the authors of the project. He believes, however, that it is not necessary to insert an addition into the text of the project and that it will suffice to introduce an explanation into the report. In the absence of a special provision, the interpretation of his Excellency Mr. ASSER is natural. Furthermore, Mr. RENAULT acknowledges the correctness of the arguments of his Excellency Mr. ASSER and will not fail to insert into the report, with regard to Article 29, a few words that will satisfy the delegate from the Netherlands.

His Excellency Mr. **Asser** states that this answer satisfies him.

ARTICLE 5

An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court.

The same rule applies in the case of persons belonging either to neutral States or to the enemy, who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

His Excellency Mr. **Asser** thinks that it would be well, by means of an express provision, to grant to each claimant the right individually to exercise the appeal before the international court.

The case may arise where several claimants (for instance, insurance companies which, through one and the same policy, have insured the vessel or the cargo and which have indemnified the owner of the objects captured), after having jointly intervened before the national jurisdiction, desire to resort to the appeal before the international court. If these claimants are not of the same nationality (for instance, insurance companies which have their headquarters in different States), it may happen in such case that, by the application of Article 4, No. 2, the Government of one or of several States may forbid access to the court to those under its jurisdiction. Such an indication must not prevent the other claimants from the exercise of the appeal. Mr. ASSER proposes, therefore, to add to Article 5 a second paragraph in the following terms:

> Each person so entitled may appeal separately up to the amount of his interest.

Mr. **Renault** states that he is in full agreement with his Excellency Mr. ASSER in regard to the latter's observations, and, as it is but a matter of detail, he will refer to it in the report.

His Excellency Mr. **Beernaert** supports the proposition of his Excellency Mr. ASSER and insists upon the insertion of the provision in the Convention itself: a mere explanation in the report does not seem to him sufficient, in view of the importance of the matter.

The **President**, after having consulted the Commission in regard to the proposition of his Excellency Mr. ASSER, says there is no one to oppose it.

[24] Mr. **Renault** states that he is disposed to come to an understanding with the committee of examination of the Commission, in order to see if it is proper to insert a paragraph of the nature proposed in the text itself.

ARTICLE 6

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the Court.

ARTICLE 7

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2*c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

His Excellency Mr. **van den Heuvel**: I should like to put a question with regard to the scope of the provisions expressed in Article 7.

Will the prize court be the judge of the international legality of the national measures which a capturing belligerent may have taken, either with regard to questions of principle or with regard to questions of procedure?

Thus, in case a neutral should protest against a legal measure of the captor, will the prize court be authorized to decide that this measure can be of no effect because it is contrary to the provisions of the conventional law, to the general principle of international law or to the rules of equity?

Mr. **Renault** declares that, without doubt, such is the idea in which the authors wish the paragraph to be interpreted.

ARTICLE 8

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the
[25] vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national court pronounces the capture to be null, the Court can only be asked to decide as to the damages.

ARTICLE 9

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—CONSTITUTION OF THE INTERNATIONAL PRIZE COURT

ARTICLE 10

The International Prize Court is composed of judges and deputy judges, who will be appointed by the signatory Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

ARTICLE 11

The judges and deputy judges are appointed for a period of six years, reckoned from the date on which appointment is notified to the Administrative Council established by the Convention of July 29, 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 12

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointments (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

The deputy judges when acting are assimilated to the judges. They rank, however, after them.

ARTICLE 13

The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE 14

The Court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 15

[26] The judges appointed by the following signatory Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other Powers sit by rota as shown in the table annexed hereto; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

His Excellency Mr. **Brun** reserves unto himself the right to present later, as soon as he shall have received from the Danish Government instructions in the matter, some remarks in regard to Article 15.

His Excellency Mr. **Carvajal,** in the name of the Dominican delegation, makes the same reservations.

ARTICLE 16

If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

His Excellency Mr. **Asser** wishes to observe that the word "judge" in this article is general in its meaning and includes as well the substitute judges, whilst in other articles of the project, "judge" is taken in the strict sense of the word, with no reference to the substitute judges.

Mr. **Renault** states that there can be no doubt upon this matter in so far as this article is concerned.

His Excellency Mr. **Hagerup** would desire the suppression of Article 16, but makes no proposition to that effect in order not to place any obstacles to the labors of the commission.

ARTICLE 17

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge or deputy judge can, during his tenure of office, appear as agent or advocate before the International Prize Court nor act for one of the parties in any capacity whatever.

ARTICLE 18

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power, which is a party to the

proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

[27]

ARTICLE 19

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

ARTICLE 20

The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins *per diem*.

These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of July 29, 1899.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

ARTICLE 21

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents.

ARTICLE 22

The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only representatives of contracting Powers will be members of it.

ARTICLE 23

The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the International Bureau acts as registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 24

The Court determines which language it will itself use and what languages may be used before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

ARTICLE 25

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 26

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the signatory States, or a lawyer practicing before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

[28] ARTICLE 27

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power applied to considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

PART III.—PROCEDURE IN THE INTERNATIONAL PRIZE COURT

ARTICLE 28

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at one hundred and twenty days, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

ARTICLE 29

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 30

In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

ARTICLE 31

If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.

Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

ARTICLE 32

If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

[29] ARTICLE 33

If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph

3, the Government who has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Articles 28 or 30.

ARTICLE 34

The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE 35

After the close of the pleadings, a public sitting is held on a day fixed by the Court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on its own initiative, in order that supplementary evidence may be obtained.

ARTICLE 36

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 37

The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 38

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

ARTICLE 39

The discussions take place in public, subject to the right of a Power who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the president and registrar, and these minutes alone have an authentic character.

ARTICLE 40

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

[30] ARTICLE 41

The Court officially notifies to the parties decrees or decisions made in their absence.

ARTICLE 42

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements.

ARTICLE 43

The Court considers its decision in private and the proceedings remain secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.

ARTICLE 44

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it, and also of the assessors, if any; it is signed by the president and registrar.

ARTICLE 45

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

ARTICLE 46

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays one per cent of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE 47

The general expenses of the International Prize Court are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 15 and in the annexed table. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE 48

When the Court is not sitting, the duties conferred upon it by Article 34, paragraphs 2 and 3, Article 35, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three judges appointed by the Court. This delegation decides by a majority of votes.

[31] ARTICLE 49

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

ARTICLE 50

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

PART IV.—FINAL PROVISIONS

ARTICLE 51

The present Convention does not apply as of right except when war exists between two or more of the contracting Powers. It ceases to be applicable from the time that a non-contracting Power joins one of the belligerents.

It is further understood that an appeal to the International Prize Court can only be brought by a contracting Power or the subject or citizen of a contracting Power.

In the cases mentioned in Article 5, the appeal is only admitted when both the owner and the person entitled to represent him are equally contracting Powers or the subjects or citizens of contracting Powers.

ARTICLE 52

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A minute of the deposit of each ratification shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to all the signatory Powers.

ARTICLE 53

The Convention shall come into force six months after its ratification. The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts, within the six months following the ratification; in this case, the period fixed in Article 28 shall only be reckoned from the date when the Convention comes into force.

The Convention shall remain in force for twelve years, and shall be renewed tacitly from six years to six years unless denounced

Denunciation must be notified, at least one year before the expiration of each period to the Government of the Netherlands which will inform the other Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain executory in the relations between the other Powers.

ARTICLE 54

Two years before the expiration of each period referred to in paragraph 2 of the pre-
[32] ceding article, each contracting Power can demand a modification of the provisions of Article 15 and of the annexed table, relative to its participation in the operation of the Court. The demand shall be addressed to the Administrative Council which will examine it and submit to all the Powers proposals as to the measures to be adopted. The Powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, and at least one year and thirty days before the expiration of the period of two years, communicated to the Power which made the demand.

When necessary, the modifications adopted by the Powers shall enter into force from the commencement of the fresh period.

Mr. **Renault** calls attention to the fact, with regard to the text of the first paragraph of Article 51, in virtue of which the Convention is applicable *as of right* only in the case of war between two or several of the contracting Powers,

that this stipulation in no way prevents one of the belligerents from declaring, if needs be, that it admits the application of the Convention even though the other belligerent be not a contracting party.

This explanation meets with no objection.

Mr. **Loeff**: Permit me, Mr. President, to say a few words in regard to the matter of ratification, of which mention is made in Articles 53, 52, and 10. No mention is made in the report of the difficulties to which the text may give rise; yet these difficulties exist. Article 53 declares that "the Convention shall come into force six months after *its* ratification." And Article 10 says that the appointment of the judges and of the substitute judges "shall be made within six months after *the* ratification of the Convention." The ratification may not, therefore, be a *fixed date* for all the contracting parties, for the six months are reckoned from this date.

On the other hand, it follows clearly from Article 52, paragraph 2 and paragraph 3, that there are as many ratifications as there are contracting States. And all these ratifications may bear different dates. According to the present text, one cannot, therefore, speak of "*the* ratification of the Convention," and, according to the same text, the Convention will not enter into force on the *same* day for all the States, and the Governments will not have to appoint other judges before the *same* date.

This irregularity can only be rectified by substituting in the place of the words of Article 53 "six months after its ratification" the expression "six months after the last deposition of ratification of one of the contracting parties." A similar modification should also be made in Article 10.

But, as it is possible that one or other of the States signing the Convention may not ratify it, it would perhaps be better still to follow absolutely the example of the Hague Conventions for private international law and make Article 53 read, *initio*, as follows:

> The Convention shall come into force six months after three-fourths of the signatory Powers shall have deposited their ratifications,

whilst Article 10 might then be made to read in an analogous manner. For "three-fourths" any proportional number that might seem sufficient could, if needs be, be substituted.

I permit myself to submit these remarks to the attention of the reporter.

Mr. **Renault** expresses his thanks to Mr. Loeff for his remarks, whose entire correctness is acknowledged. He calls attention to the fact, however, that the methods in question are only provisional. It would not have been of good augury to have foreseen from the beginning the possibility that certain States might not desire to sign the Convention. Mr. Renault declares his willingness to bear in mind the remarks of Mr. Loeff in the final project which is to be presented at a plenary meeting.

[33] The **President** puts the whole project to a vote; it is adopted by twenty-seven votes against two, and sixteen abstentions.

Voting for: Germany, United States of America, Argentine Republic, Austria-Hungary, Belgium, Bolivia, Bulgaria, China, Cuba (with reservation as to Article 15), Dominican Republic (similar reservation), Spain, France, Great Britain, Greece, Haiti (provisional), Italy, Luxemburg, Norway, Netherlands, Peru, Portugal, Roumania, Serbia, Siam, Sweden, Switzerland, Uruguay (with reservation as to Article 15).

Voting against: Brazil, Turkey.

Abstaining: Chile, Colombia, Denmark, Ecuador, Guatemala, Japan, Mexico, Montenegro, Nicaragua, Panama, Paraguay, Persia, Russia, Salvador, Uruguay, Venezuela.

The **President** declares that the project has received an absolute majority of votes and expresses the hope that several of the delegates who abstained from voting will later be able to declare themselves in favor of the Convention.

The PRESIDENT declares that he associates himself with the wish expressed by Mr. RENAULT at the close of his report when he desires that it remain a manifest proof of the sentiments which animated the Peace Conference without the opportunity offering to see it function.

The meeting adjourns at 11:30 o'clock.

[34]

THIRD MEETING

OCTOBER 4, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10 o'clock.

The minutes of the second meeting are adopted.

The program of the day calls for the reading of the report of his Excellency Baron GUILLAUME concerning the labors of the committees of examination *A* and *C*, relative to the ameliorations to be introduced into the Convention of 1899.[1]

His Excellency **Turkhan Pasha** makes the following declaration:

Before proceeding with the reading of this report, I feel it my duty to reiterate the declaration which, in the name of the Ottoman delegation, I made on July 9 in the fourth meeting of the first subcommission, and which is included in the minutes of that day, to wit,

> that recourse to the means enumerated in the Convention for the pacific settlement of international disputes is purely optional and can in no case be of an obligatory nature, and that these means can, in no way, be applied to questions of a municipal nature.

His Excellency Baron **Guillaume** reads Article 1 of the Convention project as elaborated by the committee of examination.[2] The first eight articles are adopted without discussion.

ARTICLE 1

With a view to obviating as far as possible recourse to force in the relations between States, the signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.

ARTICLE 2

In case of serious disagreement or dispute, before an appeal to arms, the signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

[35]

ARTICLE 3

Independently of this recourse, the signatory Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

[1] See vol. i, ninth plenary sitting, Annex D, pp. 395-413[399-416].
[2] Annex 70.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

ARTICLE 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ARTICLE 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ARTICLE 6

Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice and never have binding force.

ARTICLE 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted unless there be an agreement to the contrary.

ARTICLE 8

The signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

ARTICLE 9

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it expedient and desirable that the parties who have not been able to come to an agree-
[36] ment by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

His Excellency Mr. **Beldiman** expresses himself as follows:

At the time of the discussion, at the first reading, of the projects for the revision of Part III: "International Commissions of Inquiry," in the first subcommission,[1] I had been directed by my Government to express the high satis-

[1] Meeting of July 9.

faction which it had in seeing that the propositions relative to this part presented at the beginning of our labors by the French and British delegations, which propositions have since been fused into a single one, preserved the purely optional character of this important institution, and in the exact terms which had been adopted by the Conference of 1899.

It is not merely for the purpose of reiterating this declaration that I have now requested to be permitted to take the floor; but, at the moment when by our vote we are confirming the text of the former Article 9 of the Convention of 1899, and on the eve of a wider discussion of the obligatory principle in the matter of international arbitration, it has seemed to me *desirable*—in view of the fact that this word appears on the program and that we are now to vote upon it—to complete, with a simple statement of facts, the history of this article, something which may perhaps not be without a certain present interest.

Our colleagues who took part in the First Conference will recall—the minutes certify the fact—that the discussion bearing upon the obligatory nature of the international commissions of inquiry was rather animated; it may even be said that the actual drafting of the text which was finally proposed by the Roumanian delegation was marked by strife.

The report addressed to their Government by the delegates of the French Republic, whom we are happy to have among us on this day, has given publicity to the rather animated discussions which preceded the adoption of this article, and, according to the text published in the *Yellow Book,* this report explains the attitude taken in this respect, in common accord, by Greece, Roumania, and Serbia, in these terms:

> They (that is to say, the delegates of these States) did in fact plead the cause of defective administrations.

I beg earnestly of our eminent president to be persuaded that it is without the slightest spirit of susceptibility that I permit myself to recall this opinion, due to the impression of the moment, which the discussions of 1899 produced.

It is far from our thought to indulge now in posthumous recriminations which would be altogether out of place. Moreover, the personal sentiments of the first delegate from France, who is the president of "the Franco-Roumanian Alliance," are free from any malevolent interpretation with regard to Roumania. However, as a historical incident, it was deemed important to state in a simple way that the attitude taken in this question of principle by Greece, Roumania, and Serbia in 1899, may have been interpreted at that time as having had its cause more especially in the peculiar conditions in which our countries of the East then found themselves.

To-day, this principle has been unanimously recognized, and it has even no longer been seriously discussed by the present Conference.

From the beginning, the propositions of France and of Great Britain, relative to the international commissions of inquiry, without any modification whatever, have incorporated the text of Article 9, as it had been voted in 1899.

The Russian delegation has agreed to it, and it is a matter of record that there has been complete unanimity with regard to the purely optional nature which it was proper to preserve for this international institution.

[37] It is therefore necessary to state that in regard to this matter, one may not say that for the last eight years the obligatory principle has made any progress.

The **President**: I do not consider it my duty to make answer to the little interpellation which his Excellency Mr. BELDIMAN has just addressed to the president of the arbitration commission of the First Peace Conference whose functions terminated more than eight years ago. On the other hand, if it were intended to criticize the acts of a Government here represented, I do not believe that it would come within our competence to lend ourselves to such a discussion.

I should, however, be greatly surprised, if after eight years, there should be left anything but pleasant memories of a collaboration which never ceased to be cordial between all the members of the First Hague Conference.

His Excellency Mr. **Beldiman** agrees to these words.

His Excellency Mr. **Martens** desires to renew here the statements which, in the committee of examination, he made in reference to Article 9.

There has been a general accord in affirming the purely *optional* nature of the commissions of inquiry. These solemn affirmations could but set into greater relief the defective text of Article 9. The Powers are sovereign, and their right to have recourse to commissions of inquiry is subject to no limitation whatever. Nevertheless, Article 9 is so drafted as to make it appear that the Governments forbid themselves to have recourse to international commissions in case their honor and their essential interests are involved. Indeed, the article says that the Powers regard the institution of commissions of inquiry as "useful and desirable in disputes of an international nature which involve neither the honor nor the essential interests." Is this text of 1899 indeed happily worded? Does it really reflect the actual state of things after the inquiry into the Hull incident, in which the "essential interests" if not "the honor" of two great Powers were involved?

Mr. MARTENS sets forth that the Conference has profited by the experience of the Paris inquiry only to elaborate a rule of procedure which, in his judgment, is really too minute. But, on the other hand, the Conference seems desirous of disregarding the most remarkable historical lesson which results from this celebrated case. After the Hull inquiry, it is not willing to declare recourse to commissions of inquiry "useful and desirable" *in all cases.*

Mr. MARTENS presents no proposition on this day, because he believes that it could not be usefully discussed on the eve of the termination of the labors of the Conference. He remembers that even the ingenious combination proposed by the president in the committee of examination [1] to give a more logical form to Article 9, has been withdrawn. He means only to express once more his point of view which he believes in conformity with the teachings of history.

Article 9 is kept in its present form.

ARTICLE 10

International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party

[1] In the meeting of July 13.

[38] must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint assessors, the inquiry convention shall determine the mode of their selection and the extent of their powers.

ARTICLE 11

If the inquiry convention has not determined where the commission is to sit, it shall sit at The Hague.

The place of sitting, once fixed, cannot be altered by the commission except with the assent of the parties.

If the inquiry convention has not determined the languages to be employed, the question is decided by the commission.

ARTICLE 12

Unless otherwise stipulated, commissions of inquiry are formed in the manner determined by Articles 45 and 57 of the present Convention.

ARTICLE 13

In case of the death, retirement, or disability from any cause of one of the commissioners or one of the assessors, should there be any, his place is filled in the same way as he was appointed.

ARTICLE 14

The parties are entitled to appoint special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission.

ARTICLE 15

The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the signatory Powers for the use of the commission of inquiry.

ARTICLE 16

If the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry.

It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the custody of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

ARTICLE 17

In order to facilitate the constitution and working of international commissions of inquiry, the signatory Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

[39] ARTICLE 18

The commission shall settle the details of the procedure not covered by the special inquiry convention or the present convention, and shall arrange all the formalities required for dealing with the evidence.

ARTICLE 19

On the inquiry both sides must be heard.

At the dates fixed, each party communicates to the commission and to the other party the statements of facts, if any, and, in all cases, the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

ARTICLE 20

The commission is entitled, with the assent of the parties in dispute, and with the permission of the State in which the territory in dispute is located, to move temporarily to this territory, if it is not already there, or to send thither one or more of its members.

ARTICLE 21

Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 22

The commission is entitled to ask either party for such explanations and information as it deems expedient.

ARTICLE 23

The Powers in litigation undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

They undertake to make use of the means at their disposal under their municipal law, to ensure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties shall arrange for their evidence to be taken before the qualified officials of their own country.

His Excellency Mr. **Hagerup** wishes the Commission to realize that the wording of the second paragraph of Article 23 does in no way imply the obligation for the signatory States, whose legislation might not include coercive measures similar to those under discussion, to adopt similar ones.

Their Excellencies Sir **Edward Fry** and Baron **Guillaume** declare that such is indeed the interpretation that should be given to the article which has been adopted by the committee of examination.

The **President** states also that the municipal legislation must remain sovereign; if the Government has certain coercive means available, it is obligated to use them; in the contrary case, no obligation rests upon it.

[40] Mr. **Lammasch** believes that a very general meaning must be attributed to paragraph 2 of Article 23. "The means available to the Powers in controversy, according to their municipal legislation," are not, properly speaking, only the coercive measures; in certain countries, for instance, these means will also include advances of money made to witnesses for their traveling expenses, etc. The terms of the second paragraph have a very general meaning.

His Excellency Mr. **Hagerup** states that these explanations satisfy him.

ARTICLE 24

For all notifications which the commission has to make in the territory of a third Power signatory to this Convention, the commission shall apply direct to the Government of that

Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests cannot be refused unless the Power in question considers them of a nature to impair its sovereign rights or its safety.

The commission will also be always entitled to act through the Power in whose territory it sits.

Mr. **Fusinato** recalls to the minds of the members of the committee, that the wording of Article 24 and of Article 77 has resulted in a few observations by his Excellency Mr. CARLIN; and that, upon the motion of the PRESIDENT, he had been charged, together with Messrs. CARLIN and KRIEGE to reach an agreement as to a new wording.

An agreement has been reached by them as to the central thought of the matter. Mr. FUSINATO proposes to leave it to the general committee in charge of the drafting of the articles, to find the terms which shall express this agreement.

This proposition is adopted.

ARTICLE 25

The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

ARTICLE 26

The examination of witnesses is conducted by the president.

The members of the commission may however put to the witness the questions that they consider proper in order to throw light on or complete his evidence, or in order to inform themselves on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

ARTICLE 27

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

[41]

ARTICLE 28

A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks well, which shall be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is required to sign it.

ARTICLE 29

The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

ARTICLE 30

The commission considers its decisions in private and the proceedings remain secret.
All questions are decided by a majority of the members of the commission.
If a member declines to vote, the fact must be recorded in the minutes.

ARTICLE 31

The sittings of the commission are not public, nor are the minutes and documents connected with the inquiry published, except in virtue of a decision of the commission taken with the consent of the parties.

ARTICLE 32

After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

ARTICLE 33

The report of the international commission of inquiry is adopted by a majority vote and signed by all of the members of the commission.

If one of the members refuses to sign, the fact is mentioned; but the validity of the report is not affected.

ARTICLE 34

The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is delivered to each party.

ARTICLE 35

The report of the commission is limited to a finding of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to this finding.

ARTICLE 36

Each party pays its own expenses and an equal share of the expenses of the commission.

[42] After the reading of Articles 25 to 36, with no remark following, the **President** asks the Commission if he may regard the first three parts of the revised convention as adopted. (*Approval.*)

A short discussion follows with regard to the fixation of the next sitting, in the course of which the general discussion concerning obligatory arbitration is to begin.

The **President** having proposed the forenoon of the following day, his Excellency Mr. **Beldiman** states that the report of Baron GUILLAUME has not as yet been completely distributed, and he calls for a delay in order to permit the delegates who are not a part of the committee of examination to acquaint themselves with it.

The **President** believes that the publication and the distribution of the minutes of this committee have enabled these delegates to follow the discussions of the committee with care, and he believes that he interprets the sentiments of all in proposing that the labors of the Conference be pressed with energy.

Their Excellencies Mr. **Nelidow,** Baron **Marschall,** Sir **Edward Fry** endorse the motion of the PRESIDENT which is adopted.

Realizing that all the Powers taking part in the Conference are represented in the First Commission, his Excellency Mr. **Nelidow** informs the assembly that the representatives from Honduras have expressed the desire to be permitted to participate in the labors of the Conference.

At the time of the opening of the Conference, the political situation of Honduras was not yet sufficiently certain to make it possible for its Government to be recognized by other Powers. But, as at the present time, through the intermediary of the Netherland minister at Washington, an official communication has been received according to which certain Powers, especially the Government of the Republic of the United States, have recognized that of Honduras, Mr. NELIDOW proposes, on principle, to admit the representatives of the said republic to the labors of the Conference. (*Approval.*)

His Excellency Mr. NELIDOW declares that the secretariat of the Conference will inform the delegates from Honduras upon what conditions their admission to the Conference will take place.

The meeting closes at the hour of noon.

[43]

FOURTH MEETING

OCTOBER 5, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 11:15 o'clock.

The program for the day calls for the general discussion of the project of the obligatory arbitration convention submitted to the First Commission, by its committee of examination A.[1]

The **President** grants the floor to the speakers in the order of their inscription.

His Excellency Mr. **Beldiman:** The question of obligatory arbitration of which we begin this day discussion in plenary commission, has become one of the knottiest, so knotty, gentlemen, that the partisans themselves of obligatory arbitration seem somewhat put off their track in the presence of this confusion of so many diverse and at times diverging propositions—of these exceptions or restrictions made to the said principle—and finally, of those classes of controversies of such secondary importance that the ambassador from Italy, his Excellency Count Tornielli, has called them "anodynes."

But anodynes as they may be, they seem, to some, indispensable for the maintenance of universal peace. Such is at least the impression obtained from the remarkable report that we have before us, and which summarizes so well and with such perfect impartiality the laborious deliberations of our committee of examination.

In principle, and as a general thesis, the partisans of obligatory arbitration are agreed in declaring that its application, as wide as possible, would mark real progress within the field of public international law, and would offer one more guarantee of peace and of understanding between the nations. But as soon as we come to putting this principle into practice all sorts of difficulties arise, some inextricable, which now confront us.

Let us, in a few words, review the whole of the project elaborated by the committee of examination and which the latter recommends to our Commission for adoption.

The Anglo-American proposition begins with an article which tends to establish obligatory arbitration for differences of a juridical character, and for those relative to the interpretation of treaties, with the well-known [44] reservation of all the questions involving the vital interests, the independence or the honor of the one or the other of the contracting States. We shall presently see what these reservations actually mean. But, however wide and elastic they be, they are far from facilitating the practical application of the

[1] Annex 72. Report of his Excellency Baron Guillaume, vol. i, pp. 457-510 [455-510].

principle enunciated by this article. Not less than three complex problems are forthwith here made part and parcel of this proposition.

In the first place, as we are discussing differences of a juridical nature, and the interpretation of treaties, which may frequently give rise to controversies of a similar character, the question may be asked: What will be the effects of the arbitral award upon the national jurisdictions? May the arbitral award nullify the sentences pronounced by the national courts? Into what sort of a situation would the national jurisdictions be brought by a provision that would compel the State to submit to arbitration controversies that come within the competence of the national courts?

An attempt has been made to solve this grave question by means of a formula elaborated by a special subcommittee which we have become accustomed to designate briefly by the name of its president, the Fusinato committee.

This formula tended to *exclude* from obligatory arbitration conventions already concluded or yet to be concluded, in so far as they related to provisions whose application and interpretation came within the competence of the national courts.

But in the committee of examination, this solution was in the end not accepted, and the committee preferred the one which is now presented to us as Article 16 *f*, and which protects the national administration of justice from the arbitral awards, *only* in so far as their retroactive effect is concerned.

Upon this important question, the partisans themselves of obligatory arbitration were unable to agree: some accept the formula which is now proposed and subordinate in the future the national administration of justice to the arbitral awards; others, on the contrary, have made express reservations in case this draft is retained.

The question of principle has therefore remained unaltered, and the Commission is called upon to settle one of the most difficult controversies in the matter of international arbitration.

A second problem: What will be the effects of the arbitral award when it concerns the application or the interpretation of a treaty concluded between several States, of which only a few were compelled to have recourse to arbitration by reason of the obligation assumed, while the other signatories were not involved in the controversy?

This is a case which may quite frequently arise, for instance, in the matter of universal conventions. How are we to prevent these divergences in the interpretation of such a treaty, or even of serious contradictions between the arbitral award, valid only in so far as the parties in controversy are concerned, and the application of the same provisions by the other cosignatories who have not had a part in the proceedings?

The committee of examination has reached a solution which requires unanimity between the signatory States, in order that the interpretation of the point in dispute, adopted by the arbitral award may become obligatory upon all.[1] In the absence of such unanimity, the project presents no solution for this very important question, and universal conventions are thus left exposed to the complications arising from arbitral awards which concern but a few of the signatory States.

For the moment I confine myself to drawing to the attention of the Com-

[1] Article 16 *h* of the project.

mission these great difficulties to which the project for obligatory arbitration has led, and which the committee of examination, composed of a majority of partisans of obligatory arbitration, has been unable to solve: and I reserve unto myself the right to take up this matter again in the separate discussion of the articles.

But I would, even now, make answer to an objection which immediately arises within my mind and which has also been brought up in the committee of examination.

[45] It has been asked if these almost inextricable difficulties are inherent only in the so-called *obligatory* arbitration, or may they also be met with in any other arbitration case voluntarily agreed upon between the States in dispute without their being compelled thereto by an international stipulation? And why, it is asked, should obligatory arbitration alone be held responsible for complications which might equally result from any other case submitted to arbitration?

I believe that this objection merely displaces the question instead of solving it.

To be sure, the same problems that we have just now been considering, the problem of the effect of arbitral awards upon the national jurisdiction, and the other, concerning the interpretation of treaties concluded between several States, such as universal conventions,—to be sure, these two problems may be set forth for all cases of international arbitration, independently of their origin. But, the essential difference which should not be disregarded, is of an entirely different nature. What are we considering to-day? The project which is before us invites the Governments represented in the Conference to assume the *engagement*—either general with the well-known reservations, or special for certain definite classes of differences, but in that case *without* reservations—of submitting to arbitration the controversies which might arise between them with regard to the matters provided for in the convention which is to be concluded. Now to assume such an engagement means to accept in advance all these complications, inevitable in a large number of cases, without the ability of foreseeing the consequences. On the other hand, a Government free to decide in each case whether it is or whether it is not expedient to submit a controversy to arbitration, is in position to judge of all the bearings in the case. If, with full knowledge in the matter, it engages in a course which becomes prejudicial to its national jurisdiction, if it subordinates the latter to the arbitral award, it will graciously bear the results under its own responsibility, but not in virtue of an international stipulation. Here we have the kernel of the entire matter. It is precisely this obligation, this bond of law which, in circumstances which it is impossible to foresee, results in inextricable difficulties, difficulties such as the most zealous partisans themselves of obligatory arbitration have been unable to solve,—it is precisely this "juris vinculum" of a general nature which must be avoided in order not to expose the powers of the State to complications which run counter to the very nature and object of arbitration.

But before dealing in detail with this question, which touches upon the very essence of international arbitration, I must signalize a third grave difficulty cast up by the project proposed to us, the difficulty which touches upon the equality —for the parties—of the engagement to be concluded.

One of the elementary conditions of every international stipulation between sovereign states is that of equality, the absolute reciprocity of the contracted

obligation. Now this cannot be the case with the United States of America and the other republics whose constitution is conformable to that of the United States.

For Article 4 of the American proposition provides that the *compromis* must be established in conformity with the *Constitutions or with the respective laws* of the signatory Powers, something which for the United States means, for instance, that the *compromis* does not become obligatory until it has been approved by the Senate, whilst for the most of the European Powers, the *compromis* becomes obligatory as soon as it has been signed by the Government.

The ambassador from Italy has criticized this situation in the following terms which it behooves us to bear in mind:

> There is, therefore, an *evident inequality* in the obligations which the two parties will have contracted in signing the general treaty.
>
> We are, therefore, invited to a general treaty which in no way establishes equal engagements between the signatory States: some will be tied to the [46] *compromis* by the signature of their competent minister, others, in conformity with their constitution, will still have to submit the signed *compromis* to the approval of the legislative body, which is independent of the executive Power and is free either to accept or to reject the *compromis*.

Moreover, cases are not wanting in which the American Senate refused to adopt the *compromis*.

Do you believe, gentlemen, that such a situation of *evident inequality*—to use the expression of Count TORNIELLI—will escape the eyes of the European parliaments which will have to pronounce themselves with regard to the obligatory arbitration treaty which is being proposed for our signature? To my mind, this question should all by itself suffice to put us on guard against a project for a treaty which would sanction such an inequality.

In so far as the royal Government is concerned, which I have the honor to represent, it is resolved not to establish in its conventional law such a precedent of inequality in the obligations contracted through a treaty.

We are, therefore, in the presence of a project of the highest importance in the matter of public international law which leaves three grave problems unsolved, for which no solution is pointed out to us, but we are invited to act in favor of a general principle whose practical application, as I have shown, leads to the greatest difficulties.

If, instead of being a diplomatic Conference in which the freedom of discussion is naturally limited, we were a parliament, does anyone imagine that a Government would present a draft of a law, for instance, of civil procedure or of any other question of law, which would leave unsolved juridical questions of the highest importance connected with the matter in regard to which it is desired to enact legislation?

His Excellency Marquis **de Soveral**: GENTLEMEN: Kindly permit me to introduce into this discussion a note of optimism, in contrast with the pessimism of our illustrious colleague, the first delegate from Roumania. His Excellency has gone so far as to wish to refer us to the committee of examination, a penalty which, I believe, we have not deserved.

The Portuguese delegation will take an active part in the special discussion of the project which is before you.

My presentation of the matter will be as concise as I can possibly make

it, but I would depart somewhat from the rather arid sphere of jurisprudence to rise to a plane where reign more sentiment and imagination.

In the meeting of July 16, I have had the honor of submitting in a few words, the general lines of the obligatory arbitration proposition submitted by the Portuguese delegation to the examination of this Conference.

You will permit me now to summarize in your presence the conclusions which, to my mind, result from the important discussion to which this proposition gave rise in the meeting of committee A.

I shall begin, as I feel it to be my duty, with an expression of thanks and of gratitude. The committee A has taken our proposition as one of the bases of its labors and has given to the study of the different items of our list numerous of its sittings, in the course of which it was our good fortune to listen to the forceful arguments of some of the most eminent statesmen, diplomats and jurists sitting among us, and among whom I would find it difficult not to mention especially our illustrious President. On the other hand, the Portuguese list has equally served as a basis for the propositions successively presented by the delegates from Switzerland, from Serbia, from Austria-Hungary, from Great Britain and from the United States. We are indeed happy that our initiative has received such powerful support; and with the highest satisfaction we have agreed to the British proposition. And if I [47] here refer to the appreciative testimonials of which the Portuguese list has been the object, and if for these testimonials I express to the committee the warmest thanks of my delegation it is because I do not forget, gentlemen, that this list, as you all well know, does not come from us alone, but that it is a heritage from the First Peace Conference, afterwards taken up again by the Interparliamentary Union, and that the committee had every reason to take it as a text for its deliberations, in its desire to render homage and to remain faithful to the principles and to the traditions of 1899.

I have always thought that this list which had withstood eight years of criticism, and which had also profited thereby for its amelioration and completion, had no less value than any other list which any one of us might prepare, by acting from the point of view of our personal opinion or from that of the special interests of our respective countries. The discussions of the committee confirm me in these views. The list has come out of these discussions in a modified and more precise form, but still within the limits which the Interparliamentary Union had outlined beforehand and provided for. It has been said that it included too many matters; but the accusation of excluding matters from it, or at least an indication of those which it excludes, was impossible except for a few unimportant cases. And I wish to declare right now, gentlemen, that no question, in any committee has led to a more profound and more brilliant discussion.

The important report of my good friend, Baron GUILLAUME, attests that fact. I believe that outside of these precincts no one will again say that the great cause of obligatory arbitration has not been taken up by the Conference of 1907 with the attention and with the interest of which the whole world believes it to be worthy. We have shown, both by our discussions and by our votes, that questions of peace remain the principal object and the essential aim of our labors.

Another observation is imposed at first sight upon all those who have studied the minutes and the report of committee A: the principle of obligatory arbitra-

tion has been unanimously admitted therein, and differences of opinion have arisen only as to the difficulties or the inconveniences of its immediate application. The truth is that if a unanimity could not be reached with regard to the adoption of the list which we have submitted to you, it is not because it has been found unacceptable, but because some States have preferred to take more time for its study, with the promise that after a short lapse of time, they will bring us the positive, and even favorable result of that study. That which holds us apart is, therefore, a question of expediency and not a question of principle.

And even within this field an interesting evolution, which I am sure has not escaped your observation, has taken place in the committee. At the beginning of our labors, all the difficulties of the problem stood out in strong relief. It may be said that the question has been looked at from every angle and that eloquence, prudence, competence in an even degree have been availed of to signalize to us its weak points or its possible dangers. And it may even be added that certain great States whose multiple and considerable interests extend to all parts of the world, have felt the weight of the objections made, and have hesitated perhaps for a moment—and, at all events, have seriously reflected—as to the course they would follow. Still, as the discussion proceeded and it came to be understood that these objections were either common to the entire field of conventional law and could in no way be imputed to arbitration, or else were not as serious as had been thought, a feeling of confidence followed the first movements of legitimate prudence, with the result that Great Britain, and soon afterwards the United States, liberally gave their adhesion and support to the cause and patronized with their names a project for an obligatory arbitration convention.

We cherish the firm hope that this great example whose great significance and real importance public opinion will know how to appreciate, will soon [48] be followed by all of us. We hope that the discussion of the Commission will transform the large majority obtained in the committee of examination into unanimity. We have, so to say, subjected the cause of arbitration to a severe judgment. All the accusing witnesses have been heard. The accusation has been widely and brilliantly represented. Still, arbitration issues from it all, innocent—and acquitted. It is this acquittal which we ask you to confirm.

It may perhaps be said that if obligatory arbitration issues victorious from the discussion the matter of *world* obligatory arbitration remains, nevertheless, in suspension, and that the difficulties set forth will retain all their value with regard to it. But, inasmuch as we have just said that such difficulties include the whole field of international law, it would, therefore, be necessary to conclude that no world convention upon any matter is possible, that is to say, it would be necessary to close at once the Peace Conference and never reopen it. But we are far from any such course; for the last three months we have been elaborating *world* conventions upon the most difficult and the most complex matters of the law of nations; we engage in these conventions, as, for instance, in the one which gives birth to the prize court, the rights and the most vital interests of each State, and we can certainly not fail to act in the same manner when, by our own avowal, we are considering the settlement of differences in which neither our honor, nor our independence, nor any essential interest can ever be involved!

A *world* convention is proposed to us for the creation of an *arbitration*

tribunal, in which every country, regardless of its legislation, of its race, of its traditions, of its customs, of its degree of civilization, would be called upon, through the agency of a judge, to decide the differences between the nations. And, with regard to some of these countries, whose judges we are ready to accept, would we not in advance promise them justice, would we not contract with them a reciprocal assurance of equity, for arbitration treaties are never anything else?

Portugal once defined the only interpretation which would be given to a refusal of arbitration on the part of a great toward a small State. Apropos of a well-known dispute, it said: "The refusal to accept an arbitration proposed by the weaker party leaves hovering doubts as to the equity of the claim formulated by the more powerful party," and its argument went home, for it convinced its adversary.

Gentlemen, this is the reason I have for hoping that we shall not allow ourselves to be impressed by objections which, when they shall be known without these precincts, will not be understood. I appeal especially to the States of lesser power, to those that will ever be the more favored by arbitration, to those which shall find in arbitration the same security which the great Powers must seek preferably in the balance of their forces.

I hold up to them these great Powers, urged less by their interests or their selfish advantages than by the urgings of public opinion and by the progress of the pacific spirit in the world, consenting to contracting engagements with us along the right path. They are coming to us, timidly as yet, but they are coming. And I want to ask of these States if they will let go this opportunity, which, perhaps, will not soon present itself again, of entering into a compact of such tremendous importance, less by the immediate application of which it is susceptible than by the admirable principle which it consecrates in all its force.

If the result of what we have succeeded in is as insignificant as some would have believed, why put any obstacles in the way of granting it to us?

And on the contrary, what would the people say about us, if the considerable effort which we have just made should remain of no consequence?

It is we, ourselves, who have contributed to increasing the prestige which arbitration is now enjoying everywhere. Our responsibility would be heavy,
[49] and from several directions, in words of gravity, we are already reminded of it, if we should now refuse to grant to the world, in even a small degree, that which we ourselves have proclaimed as being a possible great benefit.

I am bringing my remarks to a close, gentlemen. The committee of examination has given solemn consecration to the principle of obligatory arbitration. We are entitled to be ambitious and to hope that the Commission will pay even greater homage to this same principle. The slowness of our labors—we have now been together for nearly four months—must not be aggravated through their sterility, in the eyes of an opinion which is awaiting the end of our labors in order to pass judgment upon us.

The moment has come, gentlemen, as has been so well stated by his Excellency the first delegate from Austria-Hungary, in one of his eloquent discourses, the moment has come for us to demonstrate, by votes, that we are not platonic partisans of obligatory arbitration. (*Loud applause.*)

His Excellency Baron **Marschall von Bieberstein**: On rising to combat the conclusions of the committee of examination, I realize that I am steering

against a somewhat strong current, and the brilliant discourse to which we have just listened, the warmth with which it has been received in this distinguished assembly, confirm this impression. I am not referring to the current which bears these conclusions, for its force seems to me rather moderate. But I am in the presence of a thought, more or less prevalent within the Conference and without, that the Conference, after having busied itself with a series of questions dealing with war, must "do something" in behalf of peace. The words "it is necessary to do something" have at all times been extremely repugnant to me in legislative matters; I have frequently met with them, I have observed their dangerous influence in parliamentary life. I fear their influence even more when we are engaged in modifying international law. Our discussions, both interesting and laborious, have left unsolved a series of problems and questions, which, in my judgment, are of capital importance. Still, the majority of the committee has looked upon the matter as ripe. I am of the contrary opinion; I have remained in the minority. And now I am going to exercise, with full freedom, the inviolable right of the minority—criticism. I shall do this with the more firmness because I am fairly convinced that the project before us is useful neither to the great cause of peace nor to the institution of arbitration.

Obligatory arbitration presents itself under a twofold aspect. It represents a great and noble idea, propagated with zeal by those who have entered the service of peace, of humanity and of civilization; on the other hand it is a very complex problem for the statesmen and jurists who are called to transfer this idea into the field of practical activities and to dispose of it in paragraphs, and who are responsible for the result of their work. It is a distribution of labor rather onerous for us, but we must cheerfully accept it.

The gist of the whole problem is very simple. We are dealing with the stipulation by virtue of which States mutually promise one another to have recourse to arbitration in case of eventual disputes. I am wondering what distinction it is desired to add thereto by the word "obligatory." All conventional promises are obligatory in virtue of the general and almost commonplace principle that man must fulfill his contractual engagements. The word "obligatory" must, therefore, hold a special position in arbitral matters. This is so indeed. This word is bound up with the history of arbitration, it must mark a new step in the work begun eight years ago and a real progress in the direction of the pacific settlement of international disputes. Without the precincts of the Conference, the word "obligatory" has become a sort of shibboleth for the mind deeply imbued with great humanitarian and civilizing ideas. Within the
[50] Conference we are accustomed to treat questions in a more sober manner; but I am able to state that the principle of obligatory arbitration, in the indicated sense, is universally recognized.

As a partisan of obligatory arbitration, I warmly approve of the arbitration treaty recently concluded between the kingdom of Italy and the Argentine Republic, and along the same line of thought, I shall present to you the reasons which in our judgment make the project of the committee unacceptable. This is not a rhetorical paradox but an antithesis which results from a fundamental difference with regard to the application of the principle. The question has been discussed at length in committee, and I fear that I lay myself open to the criticism of the members of the committee by frequently reiterating the same thing.

Yet, I must repeat it. There are two systems by which obligatory arbitration may be put into practice. I shall characterize them, the first as the *individual*, and the second as the *world* system.

According to the first, each State reserves unto itself individual liberty to choose its contractants in order to reach an agreement with them, either in a general way, or for special cases, upon the *compromis* clause. Precision and specification are insisted upon. They select matters that seem solvable through arbitration; they adapt the minutiæ of the *compromis* clause and of the *compromis* to the nature of the matters chosen. And as for disputes concerning the interpretation of treaties, the States which have concluded these treaties insert the *compromis* stipulation in them. This may be accomplished between two States, between a plurality of contractants, and even between States of the whole world, when, as in the case of the Postal Union, the treaty embraces the whole world. Kindly permit me to indulge in a metaphor: according to this system we begin the construction on the soil, we choose known plots from which all rubbish has been removed, we put one stone on top of the other and, in proportion to the material at our disposal, we enlarge and increase the building in an organic and substantial manner.

The world system, the one which has been adopted by the committee, follows a diametrically opposite course. We are not proceeding from the materials to the area, on the contrary, we begin by establishing the widest marginal area, that is to say, we take the whole world and then we begin our search for materials with which to cover that area. These materials we pick up somewhat in haphazard fashion, wherever they may be found, and then we assign numbers to them. This constitutes the list. The list not having proved sufficient, we have invented the table. This is the apparatus which concludes treaties in mechanical fashion. Each State enters its name under a caption of materials, and learns subsequently, after the table has been deciphered, with what States it is bound for arbitration. The choice of the material is free, but the choice of the contractants is excluded. The authors of the project have expressly stated this.

The two systems having thus been defined, I uphold two theses and I am prepared to defend the two against any opponent:

1. The conclusion of an *obligatory* arbitration treaty is possible only when the individual system is applied, whilst in the world system, the word "obligatory" will be but a title of honor, the use of which will not cover the innumerable defects of the legal obligation which are inherent in the system;

2. Progress toward the pacific solution of international disputes can be secured only through individual treaties; a world treaty, on the other hand, with its necessarily vague, elastic and general terms, will more probably lead to a new dispute than to the solution of the old.

Before demonstrating these theses, let me say a few words about the *table*. It is invulnerable from the juridical point of view. Mutual consent which forms the basis of any treaty may be established in quite different ways, by solemn [51] treaties, by an exchange of notes, by letters, by postal cards and even by tables and by automatons. This is incontestable. But, as a statesman, I combat this innovation with energy, because I find it to be in contradiction with the fundamental basis of arbitration. What constitutes the essence of arbitration? It is good understanding. It must control the interpretation of the *compromis* clause and it is indispensable for the establishment of the *compromis*.

Now, all good understanding results from a disposition of the mind and of the soul. This is true both in private life and in international life. This disposition is inseparable from the personality and from the individuality of the contracting States, of their relations, of the community of sentiments, of interests and of traditions. It is in this sense that we speak of "the spirit of the treaty." It is not a philosophical abstraction; it is an indispensable complement of the interpretation, an unfathomable element, if you wish, but real withal, that gives life to the terms of treaties and controls and insures their application. To exclude the choice of one's contractants and to conclude treaties by way of a stiff inanimate table would mean driving away that spirit, and this would mean the destruction of the ideal principle which forms the center of arbitration and which we must guard and care for that it may germinate ever anew, something which would be impossible in the arid soil of a tabulary caption.

I now pass on to the first fundamental articles of the obligatory, world and general arbitration treaty.

Arbitration is obligatory in matters of a *legal* order.

What is the meaning of this word? It has been said that it may exclude "political matters." Now it is absolutely impossible, in a world treaty, to trace a line of demarcation between these two notions. A question may be legal in one country, and political in another one. There are even purely legal matters which become political at the time of a dispute. One of our most distinguished colleagues told us the other day, on another occasion, "that politics is the realm of international law." Do we desire to distinguish "legal" questions from technical and economic questions? This would also be impossible. The result is that the word "legal" states everything and states nothing, and in matters of interpretation the result is just the same. It has been asked: Who is to decide in case of some dispute, whether a question is or whether it is not legal? So far we have had no answer. Yet, this word "legal" is the nail on which we have hung the whole system of obligatory arbitration along with the list and with the table. If this nail is not solidly fastened, everything hung on it will fall to the ground.

As to the terms dealing with the exceptions, to wit: the honor, the independence and the vital interests, I have already referred to them in my first address, where I have shown that in a world treaty they are of no importance whatever. The evil, it is true, is palliated by the clause stating that each party will itself decide as to the exception which it has set forth. Then the other evil arises, because there is no longer any obligation. These two articles begin with the imperative words "thou shalt" and end with the reassuring words "if thou so desirest." But there is another objection which is by far more serious. Through all times ambiguous stipulations and loosely-worded paragraphs have ever been one of the principal sources of international disputes. Now, here we have two articles not containing a single term which clearly defines the duties and the rights resulting therefrom, two articles which vacillate between the extreme poles of obligation and of privilege, and it is desired to recommend these dispositions to the world as "the most efficacious means of settling international disputes." For in these words arbitration has been defined in the Convention of 1899.

If we were to preach this to the world, I am sure that we would gather together a very small parish of believers. My criticism is not directed against

those who have drafted the articles; the defect which I have pointed out cannot be separated from the system. On the one hand we have the immensity of the area embracing innumerable diversities of institutions, of opinions, of tra-
[52] ditions, of sentiments, which imposes the necessity of choosing absolutely precise terms; and on the other hand it is exactly these diversities that one cannot grasp except by means of a net of heavy meshes, by terms whose generality corresponds to the immensity of the area. It is on this rock that the world system will inevitably be wrecked. For the divergencies in regard to the interpretation of an arbitration treaty which end with refusal of the arbitration asked for in virtue of a treaty, would compromise the relations of the States more seriously than the central dispute in question. Compare the first two articles of the Italo-Argentine treaty. Everything in them is clear, precise, obligatory. It is a model to be followed in concluding arbitration treaties; let us be careful that it may not be said of our articles that they are a model in the contrary sense.

I now come to *the list,* that is to say, to the enumeration of the points in which arbitration is unreservedly obligatory—except, of course, the reservation which is inherent in the word "legal," the reservation of the *compromis,* and that of the constitution. It is not an easy matter to examine the list because it changes from minute to minute. I shall, therefore, permit myself to speak of all lists, not merely of the one which is for the time being in force, but also of the lists in reserve, especially of the Portuguese list which figured first in the plan. The evident thing is the innocent nature of almost all of the points. This is not meant as a rebuke. Even disputes of secondary importance may change the relations between States. But I am wondering if it does serve any useful purpose to insert into the list treaties which, by their very nature, preclude any dispute. My imagination, for instance, fails me absolutely when I endeavor to bring to mind a dispute concerning those treaties dealing with the gauging of vessels. By those treaties the contracting States mutually promise to accept the certificates of gauging. These are treaties which one may conclude or denounce, but whose scope cannot be discussed. It is even so with regard to the "weights and measures," the "successions of deceased mariners" and others.

But there are other points in these lists calling for the most serious attention. There are treaties that force the contracting States to legislate along a certain line, for instance, along the line of "workingmen's protection." A dispute arises and we want to know if one of the States has fulfilled this obligation. Arbitration! The arbitral award calls for the modification of the law. How is this award to be enforced? It has been said that the approval of this convention by legislative factors would attribute force of law to all future arbitral awards. If this is truly so, it will indeed be difficult to secure the approval of parliaments, who will hardly be inclined to accept as rivals in legislative matters future arbitrators, unknown, whose choice will devolve upon the executive power. It has been said on the other hand, that the modification of the law demanded by the arbitral award must be submitted to the votes of parliament. But in case of a negative vote, would it be a case of *force majeure?* Jurists have not been able to agree upon an answer. Some have said "yes," others "no." The question has not been solved in the committee.

In the list we find even graver problems. It contains a series of treaties

whose interpretation and application come solely within the national jurisdiction. These are treaties concerning *private international law* in its general sense, literary property, industrial property, civil procedure, and, properly speaking, private international law. Now, the jurisdiction which one State exercises toward certain subjects of another State may be contested as being contrary to the terms and to the spirit of the treaty. In such a case, what would be the effect of an arbitral award? Article 16 *f* states that it will have no retroactive effect. This is quite evident. But the article adds that the award will have "interpretative value." This means that the national courts must comply with it.

But the courts will accept the interpretation as authentic only if the arbitral
[53] award has force of law. There we have the same problem, only it is more accentuated, for we are dealing with the national prestige and with the authority of the national jurisdiction. We desire to appeal to two absolutely separate jurisdictions for the interpretation of the same matter, and we demand that the national jurisdiction, which is a stable element surrounded with all kinds of guarantees, yield, in the future, to the interpretation given by the arbitral court which is a product of the moment and disappears as soon as the decision has been rendered. Politically and judicially this is impossible. If private international law, which until about fifty years ago was unknown, continues to develop as fast as it has developed practically during the last twenty years, the necessity will some day arise of providing for the uniform application of the stipulations relative thereto. Then, perhaps, one will think of establishing a high international court, not of arbitration, but of appeal, which shall operate in matters of private international law with the same guarantees and the same powers as our present supreme courts of justice. But this thought relates to the future; I make use of it to put into strong relief the impossibility of this article which confounds the question instead of solving it and which leads to the danger of injecting into the international dispute which exists, a national conflict between the different constitutional powers of the State. I submit these considerations to the serious appreciation of all political men.

I pass to the *compromis*. This is another testing stone for the *obligatory character*. To go to The Hague, we must necessarily pass through a door which is as a rule closed. Over that door we read the inscription "*compromis*." It is a door with a double lock. Each of the parties in controversy has a key to open one of these two locks. If they agree upon opening the door, they walk in; if they do not agree, they must retrace their steps. The dispute remains unsolved. The passage through that door and the consequent journey to The Hague are therefore purely optional. The German delegation has tried to give to the so-called obligatory arbitration, the character of a *pactum de contrahendo*, of a convention to come to an agreement. For this purpose we desired to grant to one party the right to compel the *compromis*. We did not obtain the desired success and, to my great regret, I have found ardent partisans of obligatory arbitration in the ranks of our opponents. I can therefore but repeat what I have stated before the committee, to the effect that in world obligatory arbitration the obligation shines on paper and disappears at the moment when its execution is to begin. But this is not all. It may happen that the two parties have with good understanding passed beyond the door of the *compromis* and find themselves unexpectedly before a second door bearing the inscription "constitution." It is a legislative factor which stands guard over that door, it opens and closes it

at pleasure, without any control on the part of the government of the State. As for the party which, according to its constitution, must pass through this door, the juridical bond begins only after the passage has been effected; as for the other party, the juridical bond is created by the *compromis*. This is a very curious solution. Much has been said in the Conference about the equality of the Powers, and now we desire to stipulate a clause which sanctions a manifest inequality between contracting powers. I am not criticizing; I am stating a fact.

One more word about the denunciation of the treaty. It is admitted not only with regard to all the States, but with regard to certain ones of them. One might view this clause as a concession which the world system makes to the individual system, because, by means of denunciations, I might indirectly choose my contractants. Indeed, through denunciation, each State will be able to restrict the application of the treaty to the States of its choice. But there is a great difference between not concluding a special treaty and denouncing a general arbitration treaty concluded in the solemn forms of a Peace Conference. To express myself with moderation, I believe it would be a "but little friendly" act. And I have very serious doubts as to whether it conforms to the intentions by which we have been animated when in a world treaty we put the stamp of
[54] legality upon an act which is of such a nature as to offend and chill another state.

Having thus run through the whole of the project, I now come to my conclusions. This project has one defect which, according to my experience, is the worst in legislative and contractural matters: it makes promises which it can not fulfill. It is called obligatory, and it is not obligatory. It boasts of marking progress, and it does not do this at all; it pretends to be an efficacious means of settling international disputes, and in reality it enriches our international law with a series of problems of interpretation which it will oftentimes prove more difficult to solve than the old disputes and which will be often of a nature to embitter the latter. It has been said that this project confers upon the world the principle of obligatory arbitration. It does not; for this principle is already acquired in theory by the unanimous sentiments of the peoples, and in practice by a long series, constantly increasing, of individual treaties. Germany, which hesitated eight years ago, has since, on the basis of the individual system, concluded, in a general way, and for special matters, obligatory arbitration treaties; she will continue in that course in future. The vote of to-day will therefore not bear upon the question as to whether or not obligatory arbitration shall be introduced into the world; our vote will mean this: are we to cling to the individual system which has proven its value, or are we to introduce the world system whose vitality has not yet been established? I shall vote against the latter system for the reasons I have just indicated, and for still another reason which may perhaps prove to our eminent colleague, Marquis DE SOVERAL, that he is not the only optimist. The great ideas which are destined to dominate the world make their way by their own force; these ideas prosper and develop in the sunshine of individual freedom, and they will hardly bear the shade of general principles, of lists and of tables. This, it seems, is a thought which has gone out of fashion in our day and is but an old game. But experience is in its favor. Articles 16 and 19 of the Convention of 1899, in the course of time looked upon as the product of a failure, have met with striking success.

Obligatory arbitration, which was then a small puny child, has grown up. Thanks to the excellent counsels which the First Conference gave with regard to its treatment and of its education, the child has become a very robust boy who is making his way in the world without soliciting an itinerary and a guide book. It behooves us to remove the obstacles which may be in his way; it behooves us to open the doors that are closed and to provide for the permanent institutions which will assure him a glad welcome everywhere in the world. Such is the program which I oppose to that of the majority of the committee.

The long assiduous labors which we have given to the matter of arbitration has had but a partial success. But we have become acquainted with the field of obligatory arbitration; we have explored it in its full extent and we have become aware of the difficulties that must be overcome. And if we do not carry away with us from The Hague the instrument of a world convention, we shall yet present to our Governments a work which will aid them in continuing, fully acquainted with the facts, their course toward the noble ideal of general and universal obligatory arbitration. It is true that the method which I advocate is less brilliant; but we may all return to our respective countries in comfort, strongly conscious that we are marching along a sure path and that our interested work will serve the great cause which is dear and common to us all. (*Loud applause.*)

His Excellency Mr. **Luis M. Drago:** We have before us a formula. It is not an idle formula since it contains the proclamation of the principle of world obligatory arbitration. In the midst of the diverging interests of the many nations here represented which have frequently contradictory institutions and laws and legal customs of diverse natures, it has been impossible, in spite of
[55] our efforts, to determine in advance a large number of specific cases upon which obligatory arbitration might bear.

But the matters which compose this list, however inconsiderable they may appear when studied singly, apart from the series which they form, have nevertheless a great significance when considered altogether, as the first sign of life in the principle which we have all accepted.

They are the first shoots of the sapling which should grow into the great king of the forest. They appear to have a very slender value, but if you crush them the sapling will perish and all will be lost.

As far as we South Americans are concerned, we find in that list a point which is of the highest importance: submission to obligatory arbitration of pecuniary claims when the principle of indemnification has been accepted by the parties. Very recently we have found out to what extremes this sort of claims may be carried, and how they are reduced, once they have been subjected to the study of an impartial jurisdiction.

According to official information, a demand which had been addressed to one of the South American Republics, to the amount of thirty-nine millions, was reduced to less than three millions by the process of arbitration; another one, the amount of which reached eighteen millions, was fixed at two millions. We have been witnesses of the case of a foreigner who, with the support of his Government, demanded more than one million as damages, and who, after the arbitral award, had to content himself with the sum of twenty-three thousand francs.

But even if this were not so, the Conference could not confine itself to

simple declarations of a general nature and to the expression of more or less anodyne wishes.

The project is what it could be under present circumstances; but we must admit that it offers us something of a serious nature.

In the experimental affairs of Government and politics it is only rarely that things attain at one leap the goal of our aspirations; they are much more often the result of indirect growth than of the incarnation of a theoretical conception and are more perfect because of that very fact.

We are happy also when we can signalize a tendency toward progress even in the midst of opposing and hostile efforts.

This, Mr. President, is nothing but the slow elaboration of history; in human institutions there is nothing that is enduring which has not been established by the successive aggregation, almost imperceptible, of the legal customs and traditions.

It has been objected that by accepting the project local jurisdictions would suffer, because it is thought impossible to succeed in uniformly applying the articles of the Convention in the various countries, except by imposing a definite interpretation of the existing law annulling even the judicial decisions which might depart therefrom. According to this view of the matter, the independence of the courts would either disappear or would be seriously compromised. I do not believe that the possible contradictions between the obligatory arbitration treaties and the local jurisdictions can have such a great scope.

The predominant character of a treaty is that of a pact, or, in other words, of a contract in which the nations act as the parties. From this point of view, a treaty is a political instrument, par excellence, in the sense that it creates new relations, mutual rights and obligations between the States.

Apart from this aspect of the matter which might be denoted as a public international aspect, the treaty has a value which is purely local or municipal in each of the contracting States.

In the internal legislation of the country, a treaty is no more nor less than
[56] a law promulgated by the national Congress or legislature. Now, even as the posterior law always abrogates the anterior law when it is in conflict with the latter, even so a treaty abrogates the laws bearing an anterior date, and it is, in its turn, abrogated by the more recent laws.

In those cases bearing upon private matters the courts of each State apply the treaties when they are not in conflict with posterior laws, while seeking at the same time to do all that is possible in order to conciliate both.

These courts are not expected to consider the political aspect of treaties regarded as contracts between States susceptible of creating international rights or obligations.

When we look at the question from this view-point, the solutions seem to become simple. In supposing that a new law abrogates the provisions of the treaty and that the cocontracting nation attributes enough importance to this fact to regard it as a violation of a pledged faith, the nation will take all necessary diplomatic steps with the political department of the State which concluded the treaty, and will very probably secure from the legislature a new law annulling that which might seem contrary to the international Convention. Such a law would be the more easily obtained because, in one way or another, the legislative branch of the Government always intervenes in the approbation and in

the ratification of treaties. Properly speaking, it is one of the branches of the political power which has engaged to do so. The new law would be of obligatory application for the courts even as all laws are, and the difficulties would vanish.

If, on the contrary, it is the courts which in the last instance interpret the treaty which the cocontracting nation might regard as faulty and as violating the spirit or the letter of the Convention, this nation would likewise have recourse to diplomacy in order to secure from parliament that which is called an interpretive law, which would prevent new applications in the sense to which objection is made. If the Government to which such a demand is addressed does not believe it necessary to pass such a law, the matter might be submitted to arbitration, not in order to attack the independence of the courts nor the legitimacy of their decisions, but solely to see if, in the case, the treaty might be regarded as politically put aside, and if there is, or if there is not reason to call for its authentic interpretation by the legislature and to award damages or reparations for that which might have been adjudicated in this manner; while at the same time insuring the faithful execution of the treaty and uniformity in its applications, the courts would preserve the widest independence in the exercise of their functions.

These considerations are entirely applicable in those cases in which it is necessary to introduce modifications into the existing legislation, in order that the treaty may go into force. So long as congress or parliament does not enact such laws, the courts are not concerned with treaties, but the cocontracting nation may take such steps as it may deem opportune with the political authorities of the State in order to remove this inconvenience, or in order to obtain, in such case, the necessary reparations. The possible difficulties are certainly not those which we may imagine at present. Here, as in all things, the unexpected would be allowed for. Some time ago the eminent English jurist, Mr. Bryce, published an admirable study to show that not one of the anticipations and fears of the authors of the Constitution of the United States and of their contemporaries, not one of the disadvantages which the great talent of Mr. de Tocqueville foresaw later, have appeared in the long experience of much more than a century; and that American statesmen have had to struggle with wholly different difficulties than could have been foreseen or imagined in advance. Do not
[57] let us then be paralyzed by the fear of the subjunctive, by imagining what might happen or what happens rarely. We have an example ready at hand: the Universal Postal Convention contains the obligatory arbitration clause and up to the present time it has met with no objection.

The existence of a world arbitration treaty, on the other hand, does in no way interfere with the formation of partial treaties; on the contrary, it will contribute to stimulate the conclusion of such treaties.

We have stated that the world obligatory treaty cannot, from the beginning, include all matters susceptible of optional arbitration, intended to control a definite class of relations or right.

There are differences in civilization, in habits, in legal tendencies, which would interfere with the indiscriminate application, to all the peoples, of a specific rule of law.

But there are also institutions, general lines of conduct and primordial rights which are common to the great majority of nations, notwithstanding the difference in their customs, in their languages and in their traditions.

It is here that we find the source of new relations of law which are susceptible of being submitted to world arbitration, relations that will increase day by day, owing to what has been called the contraction of the world which has been brought about by the facility of communications, by the diffusion of learning and by the growing expansion of commerce.

Partial treaties will thus serve as an experiment, a restricted experiment, and hence, free from danger.

The attempt put into practice by two or several nations will show what sort of affairs present no difficulties in practice, affairs which, on this account, will be susceptible of being generalized and of being incorporated in the list.

We are not here dealing with systems including one another. Rather, we are dealing with concentric circles whose radii follow the same direction, but some of which come to a halt at the line of the first circle, the rest following to the second line, without in any way interfering with each other.

We have many times met with this case in the history of juridical institutions. The *jus peregrinus* of the Romans, the law applicable to foreigners, did not bear prejudice to the *jus civili* of the citizens, which co-existed with it, although in time, the national development incorporated into the wider conception of the *jus gentium*, common to all the peoples, rules which, in the beginning, were an exclusive part of the quiritary law.

In a similar manner, and bearing in mind the difference, we might well have, at the same time a world arbitration applicable to the generality of the nations, and another arbitration, more restricted, created by the partial treaties between certain nations or groups of nations.

The provisions of the two would frequently coincide; but it is certain that in the course of time there would be clauses which, quite particular in the beginning, would more and more assume a general character, and that the radii of the first circle, more than once, would be prolonged and reach the second circle.

To return now to our exposition, I wish to say that the Anglo-Portuguese project which we are considering is in some respects a sort of frame intended to become the edifice of to-morrow. Let us see to it that it will not be lost.

It matters but little if we should now add new matters to the list or not. We shall have mapped the course; we shall have indicated the direction, and the future Conference will no longer have to discuss the general lines of new plans and of future declarations.

Hence it is that the project of to-day, incomplete as it may seem, plays a rôle which is eminently practical; it prepares the way, it clears the field, and it saves time for those who follow us.

[58] This beginning of a declaration of matters which might be submitted for arbitration, offers to us another aspect which likewise is practical; it gives satisfaction to the universal conscience.

The peoples no longer want war; they are absolutely opposed to war. Our civilization, which is based upon industrialism, upon the solidarity of commercial and economic interests, is fully aware of the fact that settlements by force are neither durable nor fecund in their results.

The interests of the nations are intimately bound up and interwoven; and as the evils of war can be neither limited nor circumscribed, the struggles between nations are prejudicial to all, including the victor.

To the civilization which is supported by weapons shall succeed, in a more or less distant time, a civilization founded on arbitration and justice, a superior civilization which is neither force nor power, nor riches, but rather the tranquil triumph of law and justice for the weak as well as for the strong.

These ideas have won the day in the Argentine Republic. In concluding obligatory arbitration treaties, our Governments have merely followed the inspiration of our people and directed their course.

Some days since, his Excellency Mr. BEERNAERT, in a great and masterly discussion, spoke to us of the waves of fraternity which at this moment sweep through the world. When now and then these waves become agitated, we may hear them even here. Well then, Mr. President, I believe that we have reached that point when we must take into account the ever more urgent exigencies of public opinion.

And if, unfortunately, we should part from each other without having accomplished anything worth while, at least, by its vote, the Argentine delegation will once more have shown the intention and the efforts of its country to reach the goal. (*Loud applause.*)

The Commission decides to meet again in the afternoon to complete the general discussion.

The meeting closes at 12: 15 o'clock.

[59]

FIFTH MEETING

OCTOBER 5, 1907

(Afternoon)

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:15 o'clock.

The program for the day calls for the continuation of the general discussion of the draft convention relative to obligatory arbitration.[1]

His Excellency Baron **Guillaume** takes the floor and speaks as follows:

GENTLEMEN: It seems to me the moment has come to correct certain misunderstandings.

Beginning with the meeting of July 9, of the first subcommission, the Belgian delegation made known that its Government, favorable to the principle of obligatory arbitration, desires very much to cooperate for its extension and that it accepts its application, in reserving the questions involving the essential interests of the States, for all cases of differences of a juridical nature arising from the interpretation and the application of the treaties concluded or to be concluded between the contracting parties. It added that it would even admit, under the same reservations, obligatory arbitration for pecuniary claims arising from damages, provided that the principle of indemnification, itself, had formed the object of a previous agreement between the contracting parties.

We have followed this line of conduct during the entire course of the discussions; we have not changed it. Insensible to any influence whatever, and guided only by purely juridical considerations, we have not for a single moment deflected from the path which we had laid out for ourselves.

I may add that we are as convinced as we were on the first day that we are standing on a really solid basis and that we are absolutely resolved to hold to that basis.

Your committee of examination has elaborated the so-called Anglo-American convention project, composed of articles taken from numerous propositions and based upon the principle of the "list," which the Portuguese delegation submitted to the discussions of the Conference.

It has been stated that whosoever is not favorable to the principle of the "list" is an opponent of obligatory arbitration.

And may I ask what is the essential feature of this formula? Its characteristic trait lies in the fact of admitting certain cases of obligatory re-
[60] course to arbitration, without reserving the hypothesis in which the differences, which it might be desired to remove, might bring up questions of a nature to compromise the essential interests of the States.

[1] Annex 72.

The Belgian delegation has stated that it could not foresee for any treaty, whether its interpretation or its application might not, in particular circumstances, lead to questions of a nature that would involve the sovereignty and the security of nations.

It having been found impossible to shake or controvert in an exact manner this simple realization of fact, we have fallen back upon various allegations.

Thus it has been affirmed that, desirous of getting around an arbitration clause, the States might without reason invoke motives of security and of sovereignty in order not to fulfill their obligations.

Is it necessary to state that such suspicions might prevent the conclusion of any international act whose execution, after all, always rests on the good faith of the parties, since there is no superior authority to compel the States to carry out their engagements?

One of our most distinguished and most sympathetic colleagues has, moreover, perfectly established, in language really eloquent, that no State will or could, in fact, invoke motives of refusal that might not prove weighty and sincere; it would be the target of criticism of the whole civilized world.

These thoughts seem to me final.

In the meeting of August 23, I insistently demanded that by a modification of Article 3 we be given the very sincere satisfaction of being enabled to agree to the project which had been submitted to us; I stated my intention of admitting almost the entire enumeration included in the "list"; I stated that I would accept the statement that for these classes of disputes the reservation of essential interests might not be invoked except in exceptional cases, especially in the hypothesis when either the security or the exercise of sovereignty were involved.

The concession was made in good faith; it stated exactly the minimum of inalienable questions. To our deep regret, it was not taken under consideration.

We were determined to cling to the system of the list and to qualify it as expressive of the only practical type of obligatory arbitration.

After all, is the obligation as real as is claimed so that any modification of the formula presented must be, *a priori,* declined?

On the one hand we are not willing to admit that the States may reserve certain cases in which their sovereignty and their security might be involved; but, on the other hand, the text of the Convention opens, at the will of the States which might have differences to settle, other issues much less difficult to negotiate.

At the head of the list we state that we may not avail ourselves of these precise and rational reservations; but we do not exclude the provision which confines the field of arbitration strictly to disputes of a juridical nature.

What means are available to make recourse to arbitration obligatory when a State, right or wrong, answers to the request put before it, that the difference to be settled is not of a juridical nature, but that circumstances have given it a purely political character?

How can it be affirmed, how will we convince public opinion—for this is the preoccupation of many—that the Anglo-American convention project provides for obligatory arbitration under the same conditions for all the parties, when, after having excluded any and all reservation based upon the vital interests of the States, we leave to certain ones of them, to the judgment of their parliaments, full freedom of accepting or refusing to carry out the *compromis* clause or the *compromis* itself without which arbitration is a dead letter?

[61] In the presence of these contradictions can we not say in truth that the proposition of the committee does not in a truly absolute manner sanction obligatory arbitration? It may be added, moreover, neither the Belgian delegation, nor any other delegation is opposed to that general arbitration which we would oppose to the conception of war, such an arbitration as would bear upon important political facts of a nature that might disturb the peace of the world, because they involve the honor and the vital interests of nations; but the Conference, or at least the committee whose duty it is to examine the question in the name of the Conference, is opposed to it; solemnly it has declared that it does not approve of the principle. No one has protested; and the propositions based upon the said principle have not even been examined.

From the beginning of the labors of committee A, in the meeting of August 3, his Excellency Mr. Léon Bourgeois stated "that the committee does not accept the principle of general obligatory arbitration without reservations."

Public opinion must, therefore, not be misled and must not imagine that the Conference is divided into partisans and into opponents of general obligatory arbitration; public opinion must not imagine that it is the latter who prevent the former from realizing their humanitarian and pacific plans.

Finally, shall we ask by what distinctive mark we mean to rivet the fidelity of adhesion to the principle of obligatory arbitration?

It is desired that, to the exclusion of all the rest, only those admitting the very modest list submitted to your discussions should be regarded as accepting real obligatory arbitration. Is this admissible, especially when we view the nature of the treaties mentioned in this list, and when we realize that we are dealing with conventions concerning the protection of submarine cables, the gauging of vessels, epizooty and phylloxera or the succession of deceased mariners?

Permit me to believe, gentlemen, that, established on such bases, the distinctions which it has been sought to introduce will be regarded as but little decisive.

Discussing these questions of arbitration with Mr. van den Heuvel, I repeat, once more, in the name of the Belgian Government, that it is in sympathy with the principle of obligatory arbitration with certain reservations of a public nature of which the legitimacy cannot be disputed by anyone. Our sympathies are as sincere, as real, and as effective as those of anyone present within these halls.

If we have hitherto refused to accept the system of the "lists," still we have carried our spirit of conciliation to the point of agreeing to a proposition which would subject this matter to a new examination, and to find a solution upon the matters with regard to which we stand divided.

We have but one desire, that of reaching an almost unanimous understanding, and of working for the success of means truly pacific. (*Applause.*)

His Excellency Mr. **Alberto d'Oliveira** fears from the very interesting discussion which arose in the meeting of the forenoon from the arbitration project submitted to the Commission, some of the members of the latter may have gained the impression that the principle of obligatory and world arbitration has not been recognized universally by committee A. It is for this reason that he believes it useful to state that even those members of the committee who thought they could not vote in favor of the Anglo-American project have rallied to the Swiss proposition or to the Austro-Hungarian resolution, both of which foresee the notification on the part of the Powers represented at the Conference, within a

period of time that they would agree to fix, of matters that might be made the object of a general or world obligatory arbitration treaty.

His Excellency Mr. D'OLIVEIRA then delivers the following address:

GENTLEMEN: I have regarded it as my duty to keep a record as clear as possible, of the juridical observations to which the discussion of obligatory [62] arbitration has given rise in committee A, and also of the exact result of the votes by which this discussion was brought to an end. Not being versed in those delicate questions of international law, I have endeavored the more to give deep thought to the problems that have been put before us and to appreciate exactly the solutions which have been offered us. Any time that I may have been mistaken in this appreciation, I shall gladly welcome any explanations that anyone may be good enough to furnish me.

In the beginning it was objected that obligatory arbitration in the interpretation of universal treaties would make it impossible to give a uniform interpretation to such treaties, a result which would finally induce the States to denounce them. According to this view it was to be feared that the same kinds of disputes would in each case be settled in a different manner. Arbitral awards would follow one another and not be alike, and their contradictions would become so frequent that one might, I believe, soon summarize them in the famous saying "*Quot capita, tot sententiae.*"

But in closely examining the objection, I have been able to realize that, if it was well founded, the objection was even now before us, since each State interprets as it pleases a universal treaty, and since the application of this treaty, by one State to another State, is settled at their convenience and in accordance with their distinct reciprocal agreements. More even than that: if some States were now agreeing to apply a conventional stipulation in this or that incorrect sense, and if the remaining States, having important interests in the Convention, should prefer to put up with such an abuse rather than to have recourse to denunciation, nothing might prevent so irregular a state of things to take form and to perpetuate itself. Quite the contrary; on the day when differences over the interpretation of a convention shall be obligatorily submitted to arbitration, the means to avoid or to regulate such departures will have been found. A State will know that, if it perpetrate an abuse, arbitration is there to bring it back into the straight path; and the hope that every Government might entertain of seeing one arbitral award decide differently than a previous arbitral award had decided, could, in all reason, be based only upon the defects of form or of principle contained in such an award, since in each case the arbitrators shall be animated by the same care for equity and will not set aside previous decisions upon similar cases, except when such decisions appear to them infirm through error. In short: either the first award is just and it shall be confirmed, or it is unjust and it shall be corrected. In all cases the interpretation of conventions will be entrusted to the science and to the impartiality of the arbitrators and not abandoned to the good-will, to the caprice, or to the selfish interest of each State.

This then is the way in which the solution would be found if we shared the fears for the interpretation, variable *ad infinitum,* of universal conventions. But the truth seems to be that such difficulties have never had and never will have the acute character that is feared. After all, universal conventions, as has been stated, are only the result of an agreement of converging interests between the

States. They are only applicable to matters in which each State has an equal interest in seeing uniformity insured in the interpretation of obligations assumed by insuring it itself. The Christian maxim "do unto others as you would have them do unto you," will, in the great majority of cases, dictate the attitude of the Governments. And these observations seem to correspond to the reality of the facts. As his Excellency Mr. FUSINATO stated in our committee, obligatory arbitration has already, for many years, existed in the Postal Convention, and never have those inconveniences which have been pointed out to us been met with.

His Excellency the first delegate from Germany has likewise called our attention to the great difficulties which might arise if the interpretation of a convention should come within the competence of national courts, and if the arbitral award should, in the future, impose a different interpretation upon these courts. Without losing sight of the fact that each State, in signing a convention, engages itself through all of its agencies, without our having to
[63] bother to find out upon which particular branch of the State it devolves to carry out its obligations, it has been proposed, as a compromise measure, to restrict obligatory arbitration, by an express clause, to the conventional stipulations contained in the mutual and direct engagements between the States. His Excellency Mr. ASSER, in his noteworthy exposition, has set forth very clearly that when a State confines itself to the promise of giving national legal force to such a provision of the Convention, the duty of the State will have been accomplished and terminated by keeping this promise, and the question could not arise of submitting to arbitration the interpretation given by the courts of that State to the provision of the treaty which has become a national law.

The very interesting discussions to which this question has led in the committee seemed at first sight to imply a great divergence of views among its members. But in carefully rereading the minutes some of us, on the contrary, now think that the disagreement, if it exists at all, is very slight. The opinions expressed in turn by their Excellencies Messrs. RUY BARBOSA, HAMMARSKJÖLD, RENAULT, FUSINATO, MILOVANOVITCH, LAMMASCH and others seemed to us far from irreconcilable. It is true that some of these distinguished jurists have expressed the idea that, in order to ensure the uniform interpretation of the conventions concluded between several States, it would be most advantageous if the interpretation given to international conventions by the courts of a State might be submitted to arbitration, without ever having in mind any idea of attacking the decisions themselves of these courts. But no one has maintained that such an obligation should be imposed with regard to those conventions in which the competence of national courts is expressly or implicitly recognized by the signers. But this is exactly what happens in the second case cited by Mr. ASSER, in which the States have renounced the right to protest against any judicial interpretation and have, therefore, in advance precluded any obligatory recourse to arbitration. And as it has never been in our thoughts to extend or to modify, through the Convention which we are elaborating, the scope or the nature of obligations previously contracted by the States, and as we desire to submit to arbitration only the conventions as they exist, with the restrictions and within the limits that they have laid down, we cannot but now ask if there is some interest or some usefulness to be secured in retaining in the text of the Convention those amendments which have been successively adopted

under the terms Fusinato amendment and Milovanovitch amendment, and also if it is really necessary to adopt express provisions to overcome the objection which has been pointed out to us.

Finally, it has been stated that arbitral awards directing that a State shall modify its legislation by virtue of its international treaties, might lead to disagreeable conflicts with the legislative Powers. What is the reason, it has been asked, for raising this objection against obligatory arbitration, when it applies to any kind of arbitration?

Messrs. RENAULT and RUY BARBOSA have admirably explained that the most of the arbitral awards imply the payment of indemnities for which the constitutional States must secure from their parliaments the vote for the necessary credits. Along the same line of thought, although bearing upon another point of the discussion, Mr. RUY BARBOSA has eloquently added that if the fear of a parliamentary intervention were imposed upon the Governments, such an intervention would make any sort of arbitration impossible, and it would even be necessary to add that in arbitration treaties concluded between a constitutional State and an autocratic State, equality of mutual engagements does not exist, and no one, to our knowledge, has ever maintained such a proposition.

We might perhaps also ask if, in truth, it behooves us to concern ourselves here with the reception that parliaments may give to arbitral awards. It would seem that, when the Convention under discussion shall be submitted to them, [64] it will be the business of parliaments to find out if they can and desire to ratify it. In ratifying it, they will know the obligations they assume for themselves and for their successors. And it would not be risking much in saying that an obligatory arbitration convention would, in the parliaments of the entire world, meet with a welcome at least as cordial as and perhaps more enthusiastic than the welcome we are giving it here. How shall we be able to consider parliamentary difficulties for the execution of a treaty the model of which has been precisely furnished us by the Interparliamentary Union, in which twenty-three parliaments are largely represented by men as distinguished and respected as our honorable colleagues their Excellencies Mr. BEERNAERT and Baron D'ESTOURNELLES? And if we were hypothetically to admit that a parliament could be hostile to the execution of an arbitral award, we might still ask if that parliament would not recede before the consequences of its refusal for the Government and for the country, if it would not fear the criticisms, the accusations of bad faith and even the denunciation of the Convention aimed at, on the part of the States who are victims of its attitude.

We shall not forget that, in the first place, international law is founded upon the mutual good faith of the contracting parties, since it has no superior sanction. Therefore, perfection will never be met with in these stipulations and we must always reckon with a share of uncertainty which, happily, is wider in theory than in the reality of things, international solidarity having ceased to be an ideal expression.

It is necessary that the progress to be realized shall be evident and exceed by far the inconveniences found in its train, for otherwise, we should be in the position of the man making his way on foot instead of by rail, on the pretext that he would not thus run the risk of derailment.

Another matter which perhaps has not been put into sufficient relief deserves your attention. All the objections raised against our list should have been pre-

sented, I do not mean to say at the time of the even more frequent introduction of the *compromis* clause in treaties of commerce and others, but at least at the time of the conclusion of the general arbitration treaties whose network now embraces all of Europe. For these treaties already submit to arbitration all the juridical differences, and especially those dealing with interpretation of conventions, excepting as they involve the honor, the independence or the vital interests of the States. These are the only admissible reservations. We could not even now be excused from the execution of these treaties by declaring that contradictions may arise between the arbitral awards and the decisions of parliaments or of courts. Our list does in no way extend the field of arbitration; it even limits it more definitely by omitting customary reservations in certain definite cases.

Still, arbitration treaties constantly grow in number both in Europe and in America, and none of the signalized dangers have ever developed! I am afraid that I may have been too long in exposing to you that which seems to me the result of the discussions of committee A. I shall now try—and the task will be less difficult—to be very concise in referring to the results of the vote.

At its first reading the British proposition had already secured ten votes against five. But a distinguished member of the committee observed that this majority, not sufficiently strong in his judgment, was further weakened by an absence of homogeneity which seemed probable if not evident.

Fortunately the vote, at the second reading, did not confirm these fears.
The majority had become stronger (thirteen votes against four) and a table
[65] which has been distributed will show that it was even homogeneous. As
a result of the discussions of committee A, we have, therefore, won and not lost ground.

To-day we have before us a final list of eight cases which have secured an absolute majority of votes. All these cases are not of equal importance, but three of them (pecuniary claims and the conventions for the protection of workingmen and for the protection of literary works), would, each of them, even if taken separately, suffice for the justification of the conclusion of a world arbitration convention.

In the next place you will find that France, Norway, the Netherlands, Serbia and Portugal have voted for all of the twenty-two items included in the diverse Swedish, Serbian, British and Portuguese lists; Sweden cast its vote in favor of nineteen; Great Britain in favor of sixteen; Italy in favor of fifteen; Mexico in favor of fourteen; the United States in favor of twelve; the Argentine Republic in favor of eleven; Brazil in favor of nine and Russia in favor of four. But Russia has stated that she abstained from voting upon many of the matters because she had not as yet concluded any conventions in regard to them and not because she was opposed to them; this may, of course, bring her to increase her vote when we shall have clearly decided that it is proposed to submit to arbitration conventions to be concluded as well as conventions already concluded.

We have, therefore, on the one hand, a list of eight cases which has secured an absolute majority; on the other hand, a list of twenty-two cases which has secured a sufficient number of adhesions to serve as a basis for the constitution of an arbitral union which, no doubt, will be extended in the future. Developing a very happy idea contained in the Swiss proposition, the British protocol pre-

sents us with an ingenious and practical means for the constitution of this union, under the auspices of the Government of the Netherlands.

Another invaluable advantage of this protocol is that it makes as easy as possible, and so to say, automatic, any adhesions of the States to obligate themselves mutually upon the matters included therein, or the conclusion of new agreements upon new matters, without the necessity, in each case, of opening direct negotiations or of signing separate treaties.

I hope, gentlemen, that you will recognize, after these explanations, that the result secured by the committee is worthy of your consideration and that it may not be impossible to come to a unanimous agreement, if we are animated by the same spirit of compromise and of mutual understanding which guided the labors of the committee. (*Applause.*)

Mr. **Max Huber:** Before the propositions of the committee of examination concerning obligatory arbitration are put to a vote, the Swiss delegation wishes to explain why it is that it could not accept the project which, in the first place, has been submitted to the Commission, as having been voted by the majority of the delegates represented in the committee.

We have already recalled how sympathetic Switzerland has always been to the propagation of the institution of arbitration. Yet, the Federal Council believes that the reservations of independence, of honor and of vital interests are essential and indispensable, for the special reason that at the present time it is impossible to form a judgment as to the scope of an unconditional world arbitration treaty. The Swiss delegation is, therefore, not in position to accept any proposition which might stipulate an unreserved obligation to arbitrate.

This, however, does not mean that, while attaching the highest value to the conclusion of particular treaties, in the sense so eloquently developed by his Excellency the first delegate from Germany, the Swiss delegation is opposed to the introduction into the Convention of the unconditional principle of arbitration. On the contrary, it is to enable those of the signatory Powers desiring to create among themselves and within the scope of a world agreement, bonds of
[66] obligatory arbitration, that the Swiss delegation has, in the spirit of *conciliation* and of *compromise*, presented a proposition whose principal object it is to permit each Power to offer or to accept unreserved arbitration at the time and in the measure that it might deem proper. Thanks to the system of notifications as provided for in our proposition, the juridical bond is automatically created as soon as and for as long as these notifications bear upon identical matters. In this way, the conclusion of arbitration treaties would not merely be singularly simplified and facilitated, but the obligation of arbitration might assume form to the greatest possible extent and degree.

But it is quite different with regard to a world arbitration treaty which, for the very reason that it must include all the States and take into account the divergency of their interests and of their needs, can, necessarily, contain but a very small number of matters. The system of notification seems to have the special advantage of safeguarding, at one and the same time, the freedom of action of each State and the principle of the world treaty.

The basic thought of the Swiss proposition has been acknowledged to be just and practical, since it has been adopted in the projects subsequently presented and especially in the one now before us. From this point of view, and notwithstanding the fact that our proposition has been rejected by ten votes

against five, its fundamental idea has, in fact and with but one abstention, secured the unanimous vote of the committee.

With regard to the Austro-Hungarian draft resolution, it has received eight votes against five, with four abstentions, although it comes much less nearer to the proposition of the majority than the Swiss proposition, especially because it does not forsee the creation of an immediate juridical bond upon the basis of the communications to be made within a certain period.

Finally, with regard to the protocol mentioned under Article 16 *e* of the majority project, it should be remarked that, as compared with the system advocated in the Swiss proposition, it presents the disadvantage of limiting the freedom of offers for arbitration, in demanding a previous understanding between at least two Powers. Furthermore, the table annexed to the protocol obscures the fact that it is the declarations from State to State which give rise to the juridical bond, and not the inscriptions in a table which is but a systematic record of the notifications.

Nevertheless, and even though the Swiss delegation has reserved unto itself the right of again bringing up its proposition in the Commission, and although it might be disposed to eliminate the list from it in order to ensure a unanimous vote, if this list were to awaken apprehensions, it would accept the protocol in question, if it is upon this basis of conciliation that a *general* agreement could be reached. (*Applause.*)

Mr. **Louis Renault** requests, as jurist, that he be permitted to explain what took place in the committee of examination. His Excellency Mr. D'OLIVEIRA has already given a luminous demonstration, and he can but attempt to complete his explanations.

Does the project of the committee really deserve all the reproaches which have been made against it?

I shall not consider the objections that have been directed against any general arbitration treaty. This thesis seems to be supported by the first delegate from Roumania who, according to the explanations which he has given, would admit arbitration only for disputes that have already arisen. If that has been the sentiment of Mr. BELDIMAN, I can but state that the unanimity of the other members of the Conference admits that; in the future, arbitration can be consented to, for classes of disputes and with definite States.

It must, therefore, be admitted that this system has, as it were, been practically accepted by all. That is the starting point.

[67] The question is whether there is an insurmountable barrier between this system and the system which will extend arbitration to all the nations.

In propounding this question, I do not mean to say that such arbitration should be concluded on the same basis as with some particular nation. The engagement assumed may be more or less strict, without the system losing its reality.

If arbitration were proposed without any reservations, I realize the risk which might be run.

However, in the first place we only enter into engagements with nations with which we have already concluded other conventions. The work of The Hague consists precisely in signing such conventions with a large number of nations. This shows that we deem them capable of understanding the conditions of an engagement as well as ourselves and of conforming thereto.

The question is whether we run a risk by consenting, in the first place, to be bound toward these nations in the manner prescribed in Article 16 *a*, according to which disputes of a legal nature and especially such as relate to the interpretation of treaties shall be submitted to arbitration with certain *reservations*. The ardor of our contradictors has been exercised against the elasticity of these reservations, namely: honor, vital interests, and the non-legal nature of the disputes which, it has been said, are but so many pretexts to render the engagements illusory. This article may be summed up in two expressions: "Thou shalt . . . if thou wilt."

Nevertheless these same reservations, these same terms, are used in texts which are worthy of some consideration.

The Convention of 1899 already speaks of questions of a "legal nature."

Since then, numerous special conventions have embodied the provisions of Article 16 *a*, notably the Anglo-German general arbitration treaty of May, 1904. If these expressions have any meaning in special conventions concluded between two nations, why should they lose their natural sense and no longer mean anything at all because applied simultaneously to a larger number of nations?

Does all obligation cease to exist on account of these reservations? I presume, nevertheless, that in signing their arbitration treaty England and Germany meant to obligate themselves in some manner. The reality is this: we calculate to bind ourselves to the extent which our vital interests are not at stake. However much the obligation seems to be reduced, it still exists, and a country will look twice before claiming that there is a vital question where there is none.

It is in this sense that I understand the first two articles of the project.

Is this an empty and meaningless statement?

I do not think so. Of course, we do not naïvely pretend that we will avoid a war by means of arbitration understood in this manner and expressed in this form, but we shall accustom peoples gradually *to subject their normal relations to legal rules*. It is something to settle petty international questions by justice instead of by force. If the more important questions are not submitted to arbitration, the little disputes arising in the daily life of nations will be. In this manner may be settled immediately slight controversies which often become embittered and aggravated. Above all, the habit will be thus acquired of resorting to arbitral justice and this habit can only be encouraged by increasing the number and importance of the cases to be settled in this manner. (*Applause.*)

I now come to the list and the table. It has been recognized that the basis of this latter is purely legal in character.

[68] To be sure, it is a new system, but it is also a new thing to contract engagements with forty-five nations. We must not be frightened at innovations in this epoch of wireless telegraphy. This table is very ingenious, for it enables the cases of compulsory arbitration to be recorded automatically and indicates immediately and without investigation whether two nations are obligated toward one another in a given case.

As to the list, it has been criticized in one word, namely, that it is an "anodyne" list.

One of the cases embodied in this list is far from being insignificant, and Mr. DRAGO very clearly pointed out the practical importance of this case. It relates to the fixing of the amount of pecuniary indemnity when the responsibility of the debtor nation is recognized. Is it not natural that arbitration

should be applied to difficulties of this kind, which, without jeopardizing any vital interest, require an equitable settlement?

It is true that, along with this case, there are some "anodyne" cases which might be joked about.

But this is explicable. As I have already stated, the purpose is to regulate the relations of the daily life of peoples, and to accustom them to the use of arbitration first by means of cases of minor importance. If the habit is acquired, and the procedure seems convenient, the number of cases may be increased, and, perhaps, this increase may take place automatically. (*Applause.*)

With regard to certain cases on the list, the difficulties have been spoken of which would be caused by arbitral awards in the system of "universal unions."

It has been said,

> You will create a diversity of jurisprudence, and you will consequently bring about the dissolution of these unions.

In a word, it has been *supposed* that the arbitral awards would vary. This does not show a very high degree of confidence in the arbitrators. Why should they have a tendency to render contradictory awards? Why not trust to them? Uniformity of interpretation is just as probable if not more so in the case of arbitrators than in that of national judges.

I had always thought, on the contrary, that the employment of arbitration was especially appropriate in connection with the "universal unions." The fields covered by these unions being very vast, the interpretation given to them in one part of the world may be different from that given them in another. Are there not great reasons for restoring uniformity, and can this be accomplished by any more convenient method than arbitration? What would be the good of having established uniformity in the rules themselves if diversity prevailed in their application?

The answer to be given is that of the common law. The decision rendered is binding as between the parties, but between them only.

Moreover, the Convention of 1899 provides a means of facilitating uniformity. The nations not a party to the dispute are to be notified and may participate in the arbitration which takes place between two nations. If they do not participate, the award shall be binding only on the two parties.

Would this increase the confusion? I do not believe so. The arbitral award has a certain effect, and that is to ensure a uniformity of interpretation between two nations. Without the arbitration, each one might have its own individual interpretation. The award therefore certainly enables an approach to be made to uniformity, and if it is not binding on all in all cases, it will at least have a certain moral effect on the parties and on jurisprudence, and this alone is better than nothing.

It has been thought to discern another inextricable difficulty in case of an arbitral award rendered on a question regarding which judicial decisions have already been rendered.

[69] Might there not be in this case an impairment of the autonomy of the national courts?

In the first place it appears certain, in common law, that the decision of a court cannot be modified retroactively. The only character that the arbitral award could have would be an interpretative one for the future. Could such a

character as this endanger the authority of the national courts? I do not believe so. It often happens that in nations themselves *interpretative laws*, to which the courts of the nation must conform, are promulgated because of the existence of a jurisprudence which is considered to be contrary to the spirit of the law. May we not suppose that the same thing will have to be done in the case of a jurisprudence considered to be contrary to an international convention? The country whose citizens suffer from this jurisprudence will demand arbitration. The authentic interpretation will be given by the award and the necessary measures will have to be taken so that this interpretation may have the force of law in the future. Wherein would the prestige of the national courts be affected by this?

Baron MARSCHALL said that Germany thought of establishing in the future a court of justice whose decisions could quash those of the national courts. We shall have time to think the matter over. But I wonder whether the national courts will not then feel themselves more affected than with the present common law and the operation of compulsory arbitration as I have just explained it.

It has also been asked how the award would be executed in case the cooperation of the legislative body is necessary for its execution.

This is the general problem of the relations of international law with the constitutional law of the nations. Is it for us to ask here what method should be employed by a country in order to give force of law to an arbitral award?

As regards the question of the *compromis*, which is a problem of the same character, I have already had occasion to explain myself. If it were pretended that an agreement to arbitrate should be concluded only under conditions of absolute equality, I do not see many cases in which such an agreement could be reached. This could only be imagined to take place between absolute sovereigns, capable by themselves of assuming the engagement and executing it.

In the case of the majority of nations, there are always times when it is necessary to refer to some other Power than the one which contracted the engagement. The *compromis* and the ratification and execution of the awards require, according to the various cases, the cooperation of a legislative body without which the engagement entered into by the executive is imperfect.

I will recall two celebrated cases in this connection. The first is that of the Treaty of May 8, 1871, for the settlement of the so-called "*Alabama* claims." The *compromis*, which was of capital importance in this case, had to be approved by the American Senate. In England, on the contrary, the Crown was able to sign it without referring to parliament. But when it was necessary to execute the award of the Geneva Court and pay the fifteen and a half million dollars the Crown could do nothing without the consent of the Houses. The execution of the award was therefore at the mercy of a parliamentary vote. There are thus always times when it is necessary to trust to the good faith of the other party, for in almost all countries it would be easy for the latter to elude the engagement by taking shelter behind the opposition of the legislative body.

Another no less convincing case is found in the arbitration which took place between the United States and France under the Monarchy of July. The French

Government had concluded with the United States a convention by virtue of which the sum of twenty-nine millions was to be paid to the United States. [70] The Convention had been ratified by the Crown without the consent of parliament, which, according to the Charter of 1830, was not required in such a case. When it was necessary to obtain the money, the Chamber of Deputies refused to give it to the ministry. The Government by no means considered itself relieved from its obligation. A new ministry was formed and the sum appropriated and paid.

These two facts show that there is danger that an obligation arising from an award or arbitration treaty may not be fulfilled. But must no obligation ever be undertaken because of this danger? If this is the case, no agreement should ever be made with anyone on any subject.

It is pointed out that the United States Senate has refused to ratify certain arbitration treaties. This proves nothing. One is always free to conclude a contract or not, as one sees fit. It is necessary to find a case in which a contract entered into has not been fulfilled. To my knowledge there is no case of this kind in existence. As regards the question why the Washington cabinet gave up concluding certain arbitration treaties in consequence of the demands of the Senate with regard to the *compromis,* it is a matter of national policy and is not up for our consideration.

What we must remember is that the arguments adduced with regard to the United States may apply to all constitutional countries.

Such are, gentlemen, the various reasons why I think that the project submitted to you deserves your approval. (*Prolonged applause.*)

His Excellency Mr. **Cléon Rizo Rangabé** makes the following remarks:

In the meeting of July 18, of the first subcommission, the Hellenic delegation has already explained its attitude in the matter of arbitration; it may again this day refer to the declaration made in its name during the said meeting. For it believes that in following the path of progress toward horizons of more luminous clarity, humanity could not but meet on its path this fecund institution, and that the day when it shall be generally applied will be a day of glory and of serenity for the civilized peoples; but, while endeavoring to realize that dazzling idea, let us not go by forced marches, for the road over which we are passing is as yet but a trail, newly laid out upon a difficult ground, and we might depart from it.

There follows from the preceding that the royal Government is in no way opposed to the principle of obligatory arbitration, whose high worth for friendly international relations it recognizes; the best proof of this is found in the fact that from the very inception of our discussions, the Hellenic delegation has pointed to a text which had been prepared by the committee of examination of the First Conference and which established obligatory arbitration for different matters. If in the course of the labors of the committee of examination A, organized by our subcommission, we have not again pointed to that same text, it is because a large number of the eminently competent personalities who had prepared it, were happily gathered once more in the present committee; it was their duty, in the first place, to point to the work accomplished in 1899.

Again, if now the Hellenic delegation is not in a position to vote in favor of the text prepared by the committee A, its vote must not be interpreted as

unfavorable to obligatory arbitration. As it has already had the honor to declare, it finds that in the very interest of the arbitration clause there are very serious reasons militating in favor of the system of special treaties concluded each time between two different Powers and taking into account the special relations existing between these Powers. It is under such conditions that obligatory arbitration treaties may easily extend beyond the restricted scope within which any arbitration treaty concluded between a large number of Powers must necessarily
[71] move. The very important discussions disclosed by the minutes of the committee of examination, and the votes taken upon the different matters in the list submitted have but corroborated us in this conviction.

Nevertheless, in spite of this conviction, the Hellenic delegation might take part in any effort whose object it might be to work out an obligatory world arbitration treaty. But it would find it difficult to assent to a too general formula, one including all differences of a juridical nature, and first of all, those relative to the interpretation of treaties adopted by the committee according to the text of Article 16, even though we find in it the well-known reservations regarding vital interests, honor and independence; we believe that these reservations must be interpreted in a juridical manner, and as such they have been considered in the general arbitration treaties concluded or negotiated by the royal Government. Although interpreted in a juridical manner, these formulas do not abolish the obligation of resorting to arbitration and they do not make arbitration purely optional. This being so, even with those reservations, we hesitate to subscribe to the obligation of having recourse to arbitration for every dispute of a juridical nature and, first of all, for any question of interpretation of any treaty whatever, the more so because it is very difficult, if not impossible, to determine the questions of a juridical nature, and also because, as concerns the interpretation of treaties, any question related thereto is, properly speaking, a juridical question. We could, therefore, only accept an obligatory world arbitration treaty if it dealt with definite matters. In this respect, the discussions before the committee A, have cast a bright light upon the method to be observed in determining the said matters. And it is not impossible to find formulas with the desired elasticity so that, according to the wishes of the parties, a more or less acceptable understanding may be reached. The Swiss formula which has been before the committee, as well as those other formulas along the same line, are sufficient proof.

On the other hand, however, we would regret to see omitted, even for these matters, the clause concerning vital interests and honor interpreted in the sense we have had the honor to indicate. In this connection, permit me to state frankly the feeling I have had with regard to the criticisms of which the reservations have, now and then, been the object. I believe that we have been too severe on these reservations. I am persuaded that no State will invoke them without an absolute necessity. It may be objected that there are doubtful cases; as for these, the reservations are, to our mind, indispensable, in the very interest of the fair application of the treaty which establishes the obligatory recourse to arbitration. If the reservations do not figure in the treaty, one will perhaps seek other means to avoid the contracted obligation, and one might conceive of the danger of a denunciation of the arbitration treaty or of the treaty to be interpreted by arbitration, which would be a most untoward matter.

I should desire to add that I have been very happy to realize from the

eloquent discourses to which we have just listened that our illustrious colleagues Mr. Louis Renault, his Excellency Baron Guillaume and Mr. Huber admit and proclaim the undoubted value attaching to reservations. With regard to both Belgium and Switzerland, we have viewed the question which has occupied us since the beginning of our labors in an identical manner.

Questions affecting the honor or the vital interests of the State may arise in any international difference; as we have already stated, it is the circumstances surrounding a dispute between nations which frequently give it this character. If in domestic law differences in which honor is involved have been taken before the ordinary courts very slowly, it is to be feared *a fortiori* that matters will be much the same in international law. And as regards the vital interests, no matter whether the reservation relative thereto is or is not included in a treaty, a State, we believe, will always be entitled to avail itself thereof.

[72] Moreover, the reservations whereof we speak are already included in the most of the existing treaties, and hitherto they have not led to ambiguous interpretations.

These considerations do not exclude the possibility of having a formula for these clauses, which, while permitting those who wish to omit the reservations regarding their mutual obligations in this absolute manner, would leave to those in favor of the reservations the right to assume obligations with the reservations.

I believe that along the course which we have just traced, and profiting by the extended work accomplished in the committee of examination, an acceptable solution might be found; and we feel persuaded that such a solution would contribute to extending, more and more, the field of application of obligatory arbitration which would thus take an important and certain forward step toward the goal which we mean to reach. (*Applause.*)

His Excellency Mr. **Choate** delivers a discourse in English, which he requests Baron d'Estournelles de Constant to be good enough to summarize in French. The translation follows.[1]

Baron **d'Estournelles de Constant** replies that, as usual, he will gladly do as requested, but that he regrets not having been this time forewarned; the fidelity of his translation will necessarily feel the effect of his unpreparedness.

His Excellency Mr. **Choate:** It is now ten weeks since I had the honor to present, in the name of the delegation of the United States of America, the project for a general agreement of arbitration which is to-day before the consideration of the committee. It has, I think, erroneously been called a project of a convention for "obligatory" arbitration. In my judgment the true name for it should be a project for a "general" convention of arbitration. There is nothing any more obligatory about it than there is in any other agreement of arbitration, whether between two individual States or several. It is obligatory upon them from the mere fact of their agreeing, in the one case as in the other. The committee of examination to which the project was sent, has very carefully discussed it, clause by clause and article by article, and in spite of all the efforts made to defeat it and to reduce it to an impossible minimum, the proposition, modified in only two important points of view—the introduction of a brief list of subjects in respect to which the honor clause should be waived, and the

[1 Mr. Choate's remarks, which in the original *Proceedings* appear in English as an annex to these minutes, are here printed *in full.* See footnote, *post,* p. 93.]

addition of the article providing for a protocol,—has finally received the hearty support of the committee.

I should like to say a few words in reply to the important discourse delivered by the first delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the Conference. But with all this deference it seems to me that either there are, in this conference, two first delegates of Germany, or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron MARSCHALL is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those with whom he chooses to act. But when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm for him. He sees as in a dream a celestial apparition which excites
[73] his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

But, seriously, what response has been given to our proposition? What is the fatal obstacle that we find in the way? How is all this desire to accomplish arbitration, so dear to the hearts of all the nations, manifested in fact? What hindrance is there to carrying out the purpose so general among all the nations? If the United States, France, Germany, Great Britain and Russia, and a number of other nations can exchange individual treaties with each other for the purpose of arriving at the desired result—a result which we all profess to desire—why is it not possible to arrive at the same accord in a general way, by means of a world-wide treaty?

But if we yield to the suggestions of the first delegate of Germany, it is absolutely necessary for us to limit ourselves to individual treaties with each other and to come to a dead stop at the very suggestion of a general world-wide arbitration agreement. That is the very question. If each nation can agree with each other nation separately, why cannot each agree to the same thing with all the rest together? They accept our project of an arbitration agreement on the sole condition that it be individual and not general in the form it takes, and that it never shall be a world-wide general agreement. Why? Yes, why? I ask. Why cannot a nation which is ready to enter into an arbitration agreement or agreements as to certain subjects with twenty other states come to a similar agreement with all the forty-five, if such is the imperative desire of the nations? Let Germany answer the question. The rest of us are ready to conclude a general convention in this sense because we have absolute confidence, each of us, in all the other nations. We respect the equality of all the other powers upon the basis upon which they are represented and on which they exercise suffrage in the Conference. We recognize by their conduct here their equal manhood, intelligence, independence and good faith. There are really two questions here: one of confidence or good faith, and the other of a resort to force.

It has been truly said by Baron MARSCHALL that the immediate result of the Conference of 1899 was to stimulate and advance the cause of arbitration throughout the world. You remember, gentlemen, how quickly after the con-

clusion of the labors of that Conference a great number of important Powers gave in their adhesion to the principle by exchanging individual treaties of arbitration of exactly the same tenor as that which now lies before you. We hope that the same will be the case this time, for I am sure that our labors, however imperfect the results may be, will at least still further advance the world-wide desire for arbitration and a resort to it as a universal substitute for war. And I predict that if we, who have sufficient confidence in each other, shall enter into this treaty that is now proposed, the German Government itself, even if it decides for the present not to sign, will soon be ready to adhere with the rest, and will not only be ready, but will eagerly seek to be admitted to the universal compact. She, with her enthusiasm for the principle of arbitration, will not be willing to be left out in the cold, but will be eager to unite with the majority.

We have learned much in the protracted labors of the Conference, but the best thing that we have learned is this confidence in each other and how the nations who have united in its labors are entitled to equal credit for honest intention and good faith.

[74] Now as to the question of the reservation of the right or the purpose to resort to force, which is the only other reason that I can conceive of for declining to join in a general arbitration agreement on the part of those who are ready to accomplish the same thing by individual treaties. The idea of the opposition, as I understand it, is that we should maintain our right to select our own company, and not be compelled to admit all the nations into a general agreement with us. But suppose you do agree with twenty nations and conclude such treaties with that limited number, either separately or jointly, what do you mean to do with regard to the twenty-five other nations whom you will have refused to admit into your charmed circle of arbitral accord? You must reserve, must you not, you must mean to reserve the right to resort to war against the twenty-five non-signatory States when differences with them cannot be settled by diplomatic means? Those are the two alternatives always, arbitration or force. And if you will not agree to arbitration, it must be because you reserve the right, if not the intent, to resort to force with them. But, gentlemen, empires and kingdoms, as well as republics, must soonor or later yield to the imperative dictates of the public opinion of the world. Every Power, great or small, must submit to the overwhelming supremacy of the public will which has already declared and will hereafter declare, more and more urgently, that every unnecessary war is an unpardonable crime, and that every war is unnecessary when a resort to arbitration might have settled the dispute. These are the two alternatives between which the opponents of our project must finally choose.

The project, as we presented it some weeks ago, is not new. We do not claim the credit of inventing it. We have borrowed its language from other Powers, as, for example, from Germany, from Great Britain, and from France, from treaties which they had already concluded with each other. If it is not perfect, the responsibility for its imperfections rests on those Powers as well as on ourselves.

After the masterful discourse of Mr. RENAULT, to which we have just listened, there remain very few points for me to make clear. Baron MARSCHALL is of opinion that the term "questions of a juridical nature" is obscure. But during the discussion of the even more important project relative to the estab-

lishment of the court of arbitral justice, in which he was our cordial colaborer, this difficulty was not raised.

It may be at times difficult to distinguish a juridical question from a political question, but the difficulty is the same in the application of individual treaties as in that of a general treaty, and this objection, like almost all the others which Baron MARSCHALL has raised, applies equally to both kinds of treaties.

Again it has been urged, in support of the position, that a nation may make a general treaty with twenty States and yet refuse to extend it to the forty-five; that the same difference arising betwen A and B may be of a juridical nature, and arising between C and D may bear a political character. Our project contains in itself the reply to that objection. If, on the difference arising between A and B, the question is of a juridical character, the treaty by its very terms will apply. If the same question, when it arises between C and D, proves to be, as it is claimed that it may be, a political question, the very terms of the treaty will exclude it.

The only reason why Baron MARSCHALL prefers individual treaties to a world-wide treaty is that the latter does not leave to each party the choice of its cosignatories. To this I answer: "The whole matter is one of
[75] mutual confidence and good faith. There is no other sanction for the execution of treaties. If we have not confidence one with another, why are we here?" There is no other rule among us than that of mutual good faith. That is the only compelling power which can restrain or enforce our conduct as nations. If we feel that we cannot trust each other, that is a conclusive reason for refusing to enter into treaties of arbitration with the rest. If we can, it is our solemn duty to do so, and thereby substitute arbitration for war as the world demands.

A single word now as to the perpetual hue and cry that the opponents of our project have raised as to the necessity of every *compromis* being subject to the approval of the Senate of the United States, and the baseless plea that this makes a lack of equality or reciprocity between us and other States who may enter into this treaty with us.

Without doubt, in certain cases, for the execution of the Convention by the establishment of the *compromis* the cooperation of several departments of a State will be necessary. As with the United States, so with almost all the other nations, and there is no international executive power to compel them to make it, but it is certain that the several branches of government, whose cooperation is in each case constitutionally required for the making of the *compromis*, will comprehend their duty to honor their international obligations, and we have not the right to question their good faith.

The same question of the *compromis* will always arise under every treaty, whether individual or general, because it is the only method known to diplomacy for settling the terms of the arbitration that has been agreed upon, and whatever may be the constitutional requirements as to the need of the cooperation of coordinate branches of the respective governments in making it. The making of it will always be a matter between government and government, and it is no concern of either government whether the other will have to act or sign by one or two or three branches to make it valid. The same difficulty in settling the terms of the *compromis* may be raised by a single foreign office, or by either of however many branches of government whose concurrence may be necessary.

If we begin now with a restricted number of obligatory arbitration cases, as our project proposes, there is no doubt that before the next Conference meets the number will be considerably augmented by additions under the article providing for a supplementary protocol. At the same time it is clear that a world-wide treaty will not prevent the Powers from continuing to conclude among themselves individual conventions of arbitration, under all of which the same inevitable necessity for a *compromis* will always recur. But in signing a world-wide convention, does a nation renounce absolutely the choice between arbitration and force? If one of the parties should refuse to conclude the *compromis* or to execute the award, the other has always the same right of recourse to force which it ever had if no treaty had been made. In that case the only question will be, whether it will venture upon that extreme remedy, in defiance of public opinion, or will have patience still and make further amicable efforts to bring the adversary to reason.

So far as regards the *compromis,* the arguments of the opponents of the project have been refuted by the words, as logical as they are eloquent, of Mr. Renault. Whether it is a question of an individual arbitration treaty or [76] a world-wide treaty, a *compromis,* as he has shown, will always be necessary. At the same time he has conclusively shown that the United States, by reason of the fact that the Senate must approve the *compromis,* is not less bound than other Powers by a general treaty of arbitration. He has manifested a masterly knowledge of the force and effect of the detailed provisions of our constitution and of its general working. No American lawyer could have explained it better.

Sometimes the settlement of the terms of the *compromis* is the most important question involved in the treaty and in its execution, as has been well illustrated by Mr. Renault in the case of the Alabama Claims, which resulted in the Geneva arbitration, where the settlement of the *compromis* is generally believed to have really settled the case and compelled the decision which was subsequently made by the arbitrators. That is why the United States, as well as Great Britain, in the examination of the project for the creation of the court of arbitral justice, refused to intrust the special committee with the settlement of the *compromis,* preferring to reserve the right to themselves to make their own international bargains in matters so important.

Again we have heard from Baron Marschall a new illustration drawn from the "open door." Three or four years ago we used to hear a great deal about the "open door," but of late the whole world has been silent on the subject until our distinguished friend brought it up for illustrative purposes on the present argument. The making of the treaty, he says, always leaves an inner door to be passed through, to wit, the making of the *compromis;* and, he says, to this door each of the high contracting parties holds a key, and when one of them presents himself with his key for the opening, the other may come and say,

> I cannot open my lock with my key because my Senate has the key.

Well, the Senate is just as essentially a part of the power that holds the key for the United States as the President is, and until they are both ready to give the word, the door cannot be opened. But so it is with every government which requires the concurrence of more than one branch to the making of the *compromis;* and the same difficulty arises if the foreign secretary of one party, who is enabled to act alone, says, "I am not ready to produce my key."

A sufficient reply has been given by Mr. RENAULT. It is not a question of knowing whether there are several keys, but whether the door is open or closed. From the moment when the arbitration treaty is concluded, each party is bound to unlock the door for both to pass through upon reasonable terms. One party cannot settle for the other what terms are reasonable, and until both parties agree, the *compromis* is not settled and the door is not open, whether the settlement of the *compromis* and of the opening of the door depends on the Senate, an executive council, a parliament, a sovereign, or any other administrative entity. Always, as I have so frequently insisted, it is a question of good faith in the action of the government on either side, however that government is constituted. Arbitration is concluded not between two or more underlying administrations of government, but between the two States, between the two Powers, as distinct national entities, and the carrying out of every step is between them.

This atmosphere of mistrust or distrust in which it has been sought to envelop the whole question ought to be cleared away. It is the most noxious atmosphere in which international questions can be discussed in an inter-
[77] national conference, and it ought to give place to the mutual spirit of abiding confidence and good-will. For the government that I represent, I can best dispel it by a reference to our past, which answers more eloquently than any words of mine can do, all the objections that have been raised. During the last fifty years the United States have, I believe, concluded as many treaties of arbitration as any other Power, and never in one instance has it failed to conclude the *compromis* required by the treaty. From the moment the arbitration agreement has been entered into which required the *compromis,* it has regarded the making of it on reasonable terms as a national necessity and the imperative requirement of good faith. And should it continue as a nation for a thousand years to come, it will never fail to honor its engagements, and the Senate, in the future as in the past, will ever be ready to complete the *compromis* in the spirit that the treaty requires.

Throughout the world the necessity of general arbitration is felt and proclaimed. The joint action of all the States of America, North and South, at the Pan American Conferences at Mexico and at Rio de Janeiro, demonstrates that all the States of America are of one mind, that the whole western hemisphere is a unit on this subject, and with one voice aspires to conclude a world-wide convention for the settlement of international disputes as preventive of war. If in this great cause you will lend us your cooperation, you will sustain the interests of humanity and civilization, and by the unanimous adoption of our project we shall grandly promote the welfare of mankind.

His Excellency Mr. **Milovan Milovanovitch** expresses himself as follows: In submitting to this high assembly, at the beginning of its labors, its first proposition relative to obligatory arbitration, the Serbian delegation was guided by the conviction that the main task of the Second Peace Conference consisted in searching for the means to reduce, if not to do away altogether with the causes of wars by substituting right in the place of force in the settlement of international disputes. Obligatory arbitration, that is to say, the obligation freely assumed, but assented to in advance and in a general way by the sovereign States, to submit to arbitration controversies having arisen between them, being for that reason, by common judgment, the most efficacious means, it is the organization of this arbitration, the first step in the organization of peace among the

civilized nations, which was to form the main subject of the discussions of our conference.

On the same occasion I have had the honor to declare that the Serbian proposition had taken into account the reasons and the conditions which prevent the giving even now of a general bearing to the principle of obligatory arbitration and the extension of its application, without distinction, to all international disputes. It was indeed necessary to face this evidence and to recognize, while yet regretting it, that imperious irreducible necessities demanded limitation of obligatory arbitration to strictly definite questions in order to exclude from it, above all, disputes of a political nature affecting the independence, the vital interests or the honor of the States, although it is precisely disputes of such a character which have been in the past and which will be in the future the direct causes of wars.

Thus reduced as to the field of its application and encompassed within limits no longer including any of those causes which readily impel nations to fly at each other, obligatory arbitration, as it was looked upon in our proposition, no longer answered, it is true, to the hopes which the apostles of peace placed in it, but, nevertheless, and apart from the merit of affirming the principle of juridical sanction in public international law, its practical and immediate value would also have been important. According to our formula obligatory arbitration would, in effect, still be applicable to questions in which the important interests of the States and of private individuals are involved, and which, [78] while not directly causing armed conflicts, oftentimes determine the formation of the currents of sympathy or of antipathy between the nations and thus indirectly exercise their influence upon wars.

In order to afford obligatory arbitration the possibility of developing all its beneficent action and of affirming itself as the regenerating principle of international law, it was, in our mind, necessary to submit to its application those matters of a non-political nature which, affecting more general interests, give rise to frictions and to the most frequent conflicts. This is why, without entering into a detailed statement of the more or less inoffensive questions, we insistently demanded that the following two classes of controversies, those regarding the interpretation and the application of treaties of commerce, and those concerning the settlement of pecuniary matters should be expressly included therein. No one will deny that controversies of this nature, taken by themselves, while not leading to the danger of a rupture, nevertheless frequently lead, by their multiplicity and their common weight upon the general feeling, to the creation, in time, of dangerous tensions. Thus it will be an indisputable service, not only to justice, but also directly to the cause of peace, to give a juridical solution, by way of arbitration, to controversies of this kind whenever one might not have been able to settle them through diplomacy. This would mean, if you will permit of my using the expression, the purification, the disinfection of the international political atmosphere, and in an atmosphere thus purified, it would be easier to prevent, or to lessen if they could not be prevented altogether, clashes between States for those cases left outside the field of obligatory arbitration.

The project worked out by the committee of examination which is now submitted for the approval of this Commission, is far from being satisfactory all around. Above all, we find fault with it because the list of cases for which it admits obligatory arbitration does not contain any of these matters that might

have given to this principle a real and practical importance an important part in the development of international relations. Not only does obligatory arbitration, as regulated by that project, not extend to all the stipulations of treaties of commerce, which had been the object of the Serbian proposition, but on the contrary, it was not possible to secure in the committee an absolute majority in favor of obligatory arbitration for any substantial matter whatever of these treaties, not even for the conventional customs tariff, although upon this point and within recent times, the *compromis* clause has, so to say, become a clause of style. This is true also with regard to disputes concerned with the settlement of pecuniary matters which the project of the committee subjects to obligatory arbitration under such restrictions as to give occasion to doubt that in this direction appreciable progress will be realized.

The conclusions to be drawn from these rapid and summary statements which I have just presented are not encouraging, it must be said, for the partisans of obligatory arbitration. For the only chief point upon which a unanimous agreement could be reached is the negative point that questions of a political nature are excluded from all stipulations relative to obligatory arbitration. As for the other non-political matters or matters of a judicial or technical nature, it became finally necessary to eliminate all such as are of practical value and bring in touch appreciable interests of any nature whatsoever, because of the impossibility of obtaining, so far as these matters are concerned, a unanimous or an almost unanimous approval, or even an absolute majority of the committee. As submitted to the Commission, the project is not a step forward in the immediate application of obligatory arbitration with regard to the existing positive law.

Moreover, the committee has not even thought it its duty to register as a [79] rule of general application that which, in this respect, most of the States have already approved in their mutual relations through conventions previously signed and put into force.

Under these conditions, the provisions of the project worked out by the committee of examination relative to obligatory arbitration lose, in our opinion, almost all their important practical value, and, in consequence, even though this project were to be approved in its totality, the public opinion of the world, which expected something different from this conference, would not be satisfied in its most legitimate and best founded aspirations. Nevertheless, while declaring that this project is insufficient, we shall resolutely vote in its favor, especially and above all because it contains the formal affirmation of the unreserved application of the principle of obligatory arbitration to the disputes between sovereign States, the principle which in international relations will alone give authority to the reign of effective law, law supported by juridical sanction. For the same reason we would likewise vote in favor of any, even a more modest proposition, provided the same affirmation relative to the application of the principle of obligatory arbitration is contained in it, for we believe firmly that when once introduced into the field of international law, this principle will make its way forward. And in adopting this as our rule of conduct, we shall find comfort for the insufficiency of the result obtained, in remembering that other noble ideas that have upset and regenerated the world, have frequently had very modest beginnings. (*Applause.*)

His Excellency Baron **Marschall von Bieberstein**: GENTLEMEN: The hour is too advanced for me to enter into further details in respect to my answer to

the discourses pronounced by Mr. Louis Renault and his Excellency the first delegate from the United States of America. I wish to say but a few words: I desire to express my hearty thanks to his Excellency Mr. Choate for the kind words which he expressed regarding myself, and I hasten to say that his remark regarding my changed attitude has in no way offended me. Gentlemen, I am an old parliamentarian, and I know that such an argument is a favorite one in parliamentary debates.

If his Excellency Mr. Choate were right, and if, in truth, I had this morning affirmed an opinion other than the one I expressed on July 23, such a fact would not be a reproach, but, on the contrary, it would prove that I have learned something, that at the close of this conference I am wiser than I was at its beginning; this, moreover, should not be surprising if you will remember that for four months I have been in continual relation with so eminent a statesman as his Excellency Mr. Choate.

But unfortunately, to-day even as four months ago, I hold the same convictions, and I take the liberty of handing to Mr. Choate the minutes which attest that fact. To-day, as then, I am not a partisan of abstract obligatory arbitration, but a partisan of real obligatory arbitration, which can be realized only in the individual system and which I regard as impossible in the world system. (*Repeated applause.*)

His Excellency Sir **Edward Fry** expresses himself in these terms:

With the greatest interest we have read the words pronounced this morning and this afternoon by our colleagues.

In his eloquent discourse, his Excellency the Ambassador from Germany has entered into a criticism so subtile and minute that he was able to demonstrate before us the uselessness of Article 1 of the project, but which, nevertheless, has been textually taken—as he himself stated—from the obligatory arbitration treaty concluded between Germany and Great Britain in the month of July, 1904.

[80] But I do not intend, gentlemen, to follow in detail the discourse of my distinguished colleague: I shall confine myself to two remarks:

1. Arbitration in all its forms derives its origin from the free consent of the Powers in dispute, and the only difference between so-called compulsory arbitration and optional arbitration consists in the circumstance that the consent is given in advance in the former case while in the latter it is given after the dispute arises. In either case it is only a question of a sovereign act on the part of the Powers at variance, which by no means affects the independence of these Powers any more than a contract concluded affects the independence of the contracting party.

National laws recognize the utility of an agreement made for the purpose of settling a difference and drawn up before the latter occurs, provided such agreement relates only to differences whose nature can be foreseen. Why cannot an international law follow the same course of development as a national law in this as well as in other cases?

2. I admit that it may be said, and not without reason, that in view of the reservations and the power of denunciation stipulated in the project, the compulsory character of the Convention is not very pronounced and the *vinculum juris* may be broken without difficulty. But, I repeat, the nations of the world do not allow themselves to be guided solely by legal theories or bound by *vincula juris,* and I consider that the Convention, however weak it may be from a legal

standpoint, will nevertheless have a great moral value as an expression of the conscience of the civilized world.

A law made by a people is inseparably connected with the moral idea which inspired it. We cannot divorce the moral idea from the law which expresses it. It is certain that, just as a law which is not supported by universal consent can be of no utility, a moral idea gains by being embodied in a law.

I beg of you, gentlemen, in my capacity as the oldest of the jurists in this conference, not to reject the project of the committee of examination solely on the basis of legal and technical reasons.

In my judgment, gentlemen, the time for discussion has passed. For weeks, aye for months, we have discussed the question, and I believe that we begin to feel that we have had enough of it. A certain lassitude becomes evident and it is with impatience that we hear the words "obligatory arbitration." We are acquainted with all the points of view, with all the arguments for and against, and I believe that no discourse, no matter how eloquent it may have been, has gained or lost a single vote for the cause that is pleaded. Therefore, let us, as soon as possible, get to the votes and to the farewells.

His Excellency Baron **Marschall von Bieberstein:** His Excellency Sir EDWARD FRY and Mr. LOUIS RENAULT have turned against me the very terms of the arbitration treaty concluded between Germany and Great Britain in 1904, in which they have singled out the words "questions of a juridical nature," and the reservations concerning "the honor and the vital interests."

Gentlemen, I cannot go on incessantly repeating myself.

In my discourse of July 23, I have already declared that certain expressions that have an importance between two States which know one another have no importance whatever in a world treaty; and in my discourse of this forenoon I repeated it.

His Excellency **Samad Khan Momtas-es-Saltaneh** expresses himself as follows:

I had requested the privilege of speaking in order to make a small statement in favor of the great cause, but, after having listened to some dis-
[81] courses both eloquent and pessimistic upon obligatory arbitration, I wish to say that, even while being in complete accord with the eminent orators who have tried to point out to us with much authority the obstacles we might encounter upon our way and the gaps that would be evident in the Convention which is in preparation, we find that the advantages of a world arbitration convention are so great and the guarantee it will offer to the whole world is so immense that it is our duty to disregard the relatively small obstacles and to leave it to our, perhaps more fortunate, successors to fill in those gaps.

It is, therefore, with these sentiments, and more convinced than ever, that I hasten to make my declaration.

In the opinion of the world, the great merit of this conference is the fact that all national consciences are here on an equal footing, and that each of the States that we are representing here is entitled to its share of justice and of truth.

We are gathered here, all of us, to manifest as with one voice, our devotion to the cause of arbitration. Unfortunately, we know that this great cause will not triumph over night, but this is one more reason why its defenders should

show themselves persevering and faithful. As for myself, it is with a feeling of respect and of pride that, in the name of my Government, I contribute one stone to the construction of the edifice for which, without distinction of country, of continents, of races, mankind is grateful to our predecessors for having dug the foundation. The question now is to raise it a bit higher, until the day when, more fortunate than ourselves, our successors may celebrate its definitive and glorious accomplishment.

In consequence, we vote for the principle of arbitration and for its widest applications. (*Applause.*)

His Excellency **Turkhan Pasha**: By the order of its Government, the Ottoman delegation declares that it may not agree to any proposition tending to obligatory arbitration. In consequence, it will vote against the project for obligatory arbitration which has been presented by the committee of examination.

His Excellency Mr. **Martens** states that after so many superb discourses, he shall not fail in the agreeable duty of being concise in his remarks. In the course of this day many criticisms, of a purely juridical nature, have been directed against the project of the committee of examination. It must not be forgotten, however, that the question of obligatory arbitration is, above all, a world question, a question of civilization and of culture. The eyes of all the peoples are turned toward obligatory arbitration, as it were toward a luminous lighthouse, and the voices that demand its introduction become more and more pressing. We must, above all, think of the moral effect which the decision of the conference in favor of obligatory arbitration might exercise.

His Excellency Mr. MARTENS then explains why the Russian propositions are this day more modest than they were in 1899, as regards the *scope* of obligatory arbitration. During the last eight years Russia has forgotten nothing and learned much. To-day she wishes to secure at least something, and, at all events to pass the first mark and proclaim the great principle of obligatory arbitration.

The speaker then stresses the intimate and necessary bond between the institution of obligatory arbitration and that of a really permanent arbitral court. This is the reason why the Russian delegation presented its small and modest project for a court of three judges, chosen from amongst the members of the existing court. In order that obligatory arbitration may rest upon solid bases a court is required, to which access is easy and uncostly, a court with doors and windows open to all the world. The two questions are intimately bound together; they cannot be solved separately. Before leaving The Hague, it is our duty not only to proclaim the principle of obligatory arbitration, but also
[82] to create a court whose simple machinery and regular operation would facilitate the application of the great new principle introduced into international life. (*Applause.*)

His Excellency Mr. **Lou Tseng-tsiang** makes the following declaration:

I have requested the privilege to speak in order that in a few words I may explain our vote which until now was favorable to the project in question, but which has now become unfavorable, to our great regret, through the insertion of Article 16 *l*.

After having acquainted ourselves with the report before us and not having found in the said report any explanation concerning the object of the insertion of Article 16 *l* in the project of the Convention to be concluded, we believe it our

duty to state before the high assembly that the article in question is in full contradiction with the opinion of the champions of arbitration.

The goal towards which all our efforts are tending, the efforts both of the committee and of the Commission, is to widen as much as possible the classes of differences that might be submitted for arbitration; a restriction of these classes would be a grave denial of the so noble and so elevated purpose of extending the empire of law and of fortifying the sentiment of international justice.

Furthermore, the article in question seems to us to be directed especially at certain countries, among others, at our own; in consequence, we could not but vigorously protest against this clause, and, until it is removed, we could not but vote against this project containing a clause contrary to equity and to justice, which are the fundamental elements of arbitration itself.

His Excellency Mr. **Keiroku Tsudzuki**: Not having received the erudite and comprehensive report of Baron GUILLAUME until about ten o'clock last night, I have not even had time to read it, and even less time to study it. On the other hand, not having been a member of the committee of examination, it was with great difficulty that we were able to discover where the great articles discussed this day with so much warmth could be found or where they had been hidden away. But this did not prevent me from listening with great attention, and with the greatest interest, to all the arguments for and against. And I find myself in a very embarrassing situation, because I feel that there are good reasons on both sides. Nevertheless, as we have always supported the principle of arbitration and as we represent a country which belongs to the small minority of the States that have actually appealed to the machinery available at The Hague for settling international differences, and again as we deeply appreciate the noble, pacific and humanitarian ideas that give life to the institution of arbitration, it is necessary to confess that the psychologic balance of our delegation has rather inclined toward those who have supported the principle, rather than those who have fought it. But, in spite of all that, it is nevertheless necessary to state that the consecration of the principle of arbitration to a universal obligation is at least a new point of departure beyond the great lines traced by the Convention of 1899. This consecration is of a nature which may lead to very serious consequences and responsibilities and to the rather grave limitations of sovereignty of each contracting State. Hence, I do not believe that it is unreasonable to ask that the Governments be given the necessary time to subject the matter to a thorough study before they are obliged to pronounce themselves finally upon the proposition presented to us; that we will be given time to enter upon a preliminary and minute examination of the question in all its aspects, and in all its repercussions upon the political, economic and legal activities of the national and international life of my country, before taking our final attitude.

Under these circumstances, I shall reserve my opinion upon the proposition and shall abstain from voting.

[83] His Excellency Mr. **Brun**: The Danish Government gives its full and complete adhesion to the idea of obligatory arbitration, of which it has given practical proof by concluding several obligatory arbitration treaties not containing any reservation; and it has learned with deep regret that the negotiations of the Conference seem bound not to reach a general and immediate application of this principle.

In view of these circumstances, it has, nevertheless, authorized me to vote

for the Portuguese-British proposition, as well as secondarily for the propositions of more restricted scope that are submitted.

Mr. **Corragioni d'Orelli**: The Siamese delegation avails itself of this opportunity to declare once more, that, according to the instructions it has received, it shall vote as in the past, in favor of any proposition the object of which is the confirmation and the more general application of the principle of arbitration. Its sympathy for obligatory arbitration is not less real and sincere, and we would, indeed, have been very happy to give our approval, without reservation, to the project which is submitted to us and which consecrates this principle.

It is true that we hoped to be able to vote in favor of the whole project, but we shall be obliged to make reservations regarding Article 16 *l*, of the British project, dealing with the interpretation or the application of extraterritorial rights. In the name of the Siamese delegation, I reserve the privilege of explaining our viewpoint in this matter when we proceed to the discussion of the project.

His Excellency **Samad Khan Momtas-es-Saltaneh** declares that he will likewise have to speak of Article 16 *l*, but that in awaiting the propitious moment he supports the declaration made by the Siamese delegation.

His Excellency Mr. **Mérey von Kapos-Mére** makes the following address:

If, in spite of the late hour and the impatience which probably is felt by many of our colleagues, I have still asked for the privilege to speak, it is because, being the author of a proposition which, at a certain moment, that is to say, when it was submitted to a vote in the committee of examination, came near receiving the most favorable vote and passing as first proposition to the Commission, I feel in a measure compelled to explain, in a very brief way, my way of looking at the subject of obligatory arbitration.

I begin with the declaration that to a certain point I am a partisan of obligatory arbitration properly so-called, that is to say, without restriction and without reservations, and I will even to-day add that I am not merely a platonic partisan of it. Moreover, I have given proof of this, and in that way I have justified the words which his Excellency Marquis DE SOVERAL has done me the honor of quoting in his brilliant speech of this day, in submitting to the committee of examination a proposition which had a two-fold object: the establishment of the unanimous acceptance of the principle of obligatory arbitration and its practical application within a short time.

In my opinion, obligatory arbitration may be usefully applied to certain well defined matters not being of a political nature nor even exclusively of a juridical nature, but rather of a technical character. The application of obligatory arbitration to political questions, or even in a general way to grave or important questions, will in all probability remain for a long time to come a fair but unrealizable dream. Gentlemen, you see that in my opinion the field of obligatory arbitration is at the present time rather of a relatively narrow nature. The first consequence that I draw from this premise is that in our discussions the importance of the matter of obligatory arbitration has now and then been exaggerated. Even if we were unanimously agreed to accept henceforth all of the Anglo-American list, that would be indulging ourselves in a fatal
[84] illusion in believing that we would in this way have contributed to the peace of the world or satisfied the demands of mankind. It requires but a modest diplomatic experience to realize that never before has a grave dispute

arisen between several Powers with regard to any one of the points in this list. Looked at from the point of view of these great and noble ideas, the entire list represents nothing but trifling matters. Mankind and general peace stand not to gain anything by it. The only ones to draw profit from it would be the Governments, the chancelleries that might rid themselves of some interminable and rather fruitless correspondence. If somewhere in the world there were a pharmacy where medicines could be found for the curing of all the ills from which mankind suffers, obligatory arbitration would certainly not be ranked in it as among the heroic remedies, but would at the most figure among those modest and inoffensive family medicines fit, at most, to relieve a passing discomfort. He would be a bad physician, however, who, making the rounds of the rooms in a hospital, would content himself with writing out a prescription and having the same medicine administered to all the sick, without having studied the nature and examined the location and extent of the trouble of each patient, without having taken into account their different individualities. To be sure, as far as concerns the use of an inoffensive drug, the consequences of such a procedure would hardly be catastrophic, and the sick would not die of it. Nevertheless, complications would arise in some, aggravations of the sickness would take place in others and the disciple of Asclepios in question would certainly deserve to be called unpardonably superficial. I shall now abandon the metaphor for the moment and return to the matter of obligatory arbitration. We have recognized —and in this our opinions were not divided—that obligatory arbitration offers the practical means for removing and solving certain controversies that might arise with regard to the interpretation of a whole category of international treaties. It is incontestable that these treaties contain a long series of stipulations of a purely technical nature, and without any intention of casting doubt upon the vast and pronounced learning of the members of this conference, I cannot help but wonder if we also are specialists in all these matters, and if among us there are many experts in postal matters, in matters of telegraph, of submarine cables, on the gauging of vessels, of collision upon the high seas, etc. Still, it is proposed that we should light-heartedly and as a whole submit to obligatory arbitration the totality of these treaties with the text of which many of us are undoubtedly unacquainted and whose technical phase not one of us is even capable of understanding. Accustomed to act in the exercise of my functions only when I am fully acquainted with the case, I cannot admit, on my part, such a manner of procedure; I will not go to the extent of pretending that the consequences thereof would be fatal, but I feel convinced that by adopting here in the Conference a list—however small—we would be taking a step without sufficient consideration, one whose consequences we could not foresee. Instead of removing the calamities that we have in view, we would create new ones. This is the reason why I have permitted myself to do what every conscientious physician would do in a like case: call for a consultation of specialists. The proceeding is perhaps less rapid, less radical, but certainly more earnest and sure. If public opinion truly attaches some importance to the application of obligatory arbitration to these questions of lesser importance—a fact as to which I am personally not certain—it will remain patient for another year after having waited for centuries.

I do not, at least not at present, desire to enter into the discussion of the juridical phase of the entire question. Better than I could have done in this

respect, his Excellency the first delegate from Germany has pointed to all the weak spots, to all the juridical anomalies of the proposal which has been submitted to us. I have confined myself to calling your attention to the tech-
[85] nical aspect of the matter. And in doing so I have implicitly given reasons for the Austro-Hungarian proposition. This proposition is also before you. It consists of two parts: the establishment of the unanimous acceptance of the principle of obligatory arbitration and the application of this principle to certain treaties—or to parts of treaties—after a previous study left to the competent departments. In accepting this resolution each one of us would, at the end of a year, come to the same conclusion—if not to a more important conclusion than the one we would secure in now adopting the list or the protocol. But instead of taking a definite engagement at the present time in ignorance of its importance or of its details, we would be acting prudently in leaving it with our Governments to closely examine the field within which obligatory arbitration shall henceforward be exercised. The question is not one of acting swiftly, but of acting well.

With great attention I have listened to the exceptionally remarkable discourses that have been delivered up to the present time upon the matter that preoccupies us. On the part of the majority of the members we have listened to optimistic discourses, to discourses full of conviction and full of enthusiasm. The minority has endeavored to show us the other side of the medal. That which is certain is the fact that we are discussing a serious question, a series of articles and of stipulations which, after they have been adopted, would bind our Governments. Sentiment—not to mention sentimentalism—has no place in such a discussion. And even though one of the preceding speakers has sought to act upon the minds of the representatives of the small States by dazzling before their eyes the advantages that would result for the weak from the introduction of obligatory arbitration, I, in my turn, now address myself to these same representatives by giving them the very sincere advice to distrust such a hope. For one case in which the weaker will profit by the institution of obligatory arbitration, there will be ten other cases in which he will feel its consequences and its rigors. It will suffice to recall a certain number of cases when, within the last ten years, small States have had recourse to arbitration with regard to great Powers, in order to realize that this weapon with two edges—for such is international arbitration—is not always in favor of the weak.

In closing, there is left for me to say that, for reasons which I have taken the liberty of unfolding and which other speakers had already dwelled on before me, I am not able to accept the proposition of the committee of examination. Convinced that this proposition will not receive the unanimity—or almost the unanimity—of the required number of votes, I believe—without being, in a general way, an optimist—that the Austro-Hungarian resolution will soon be regarded as the only possible and practical issue of our discussion upon the question of obligatory arbitration.

His Excellency Mr. **Beldiman** desires, before the close of the meeting, to remind Mr. Louis Renault of the fact that Roumania has concluded several treaties of commerce with *compromis* clauses. This fact is in no way in contradiction to that which he declared in the meeting of this forenoon; he reserves unto himself the right to bring it up again.

The **President** declares that, after the two meetings which have just been

held, the Commission is on the eve of an admirable day of labor and of discussion.

Many have found that the time given to our labors by the committee of examination has been long. I hope that those who were not present at these meetings will admit that this time has not been wasted: it is thanks to the length of time given that such a discussion could be procured and a preparation made for a solution.

Equal homage must be paid to all, both to those who have fought and to those who have advocated the project: for it is from this collaboration of pro and con that we secure the necessary light, and it may be stated that all have equally contributed to our definitive decisions.

I have not desired to participate in the discussion, but I cannot bring it to a close without giving expression to my personal feeling and to my conclusions.

[86] As President, I have, furthermore, a duty to fulfill. I have promised to lead the totality of our good-will as far as possible along the road.

I shall still have to exert all my efforts in order that the work of our eleven meetings of the Commission and of our seventeen meetings of the committee of examination may not remain useless, and that it may yield the largest amount of fruit.

For that purpose, I must in the first place make clear the object that brings us together. I must endeavor to delimit exactly the points that separate us and not to let it be believed that they extend to other objects.

Reference has already been made to my words of last August:

> We are here to be united and not to be counted.

I shall not forget them when I am to find out by what means it will be possible, by the aid of us all, to mark a new progress for the great cause of arbitration.

The principle of obligatory arbitration is no longer contested.

All have declared themselves in that sense. As for himself, Baron Marschall has clearly stated to us:

> In principle, the German Government is to-day in favor of the idea of obligatory arbitration.

We are all of us glad to see that the treaties of permanent and obligatory arbitration are increasing.[1] All have commended the Italo-Argentine treaty which was concluded here but a few days ago. All of us are convinced that the application of obligatory arbitration "may be made to *all the disputes* of a juridical nature and relative to the interpretation of treaties." The proof thereof is found in the many treaties of Italy, of Germany, of Great Britain, of the United States, and of the Argentine Republic.

But the two questions that still remain before us are the following:

1. Can obligatory arbitration be established by a universal convention for these disputes of a legal nature or relative to the interpretation of treaties?

Yes; so answers your committee by fourteen votes against four, with the exception of the necessary reservation of independence and vital interests.

[1] Thirty-three treaties from 1899 to 1907.

2. Even with regard to certain ones of these disputes, cannot obligatory arbitration be established without reservation of this kind, by the same convention?

Yes; so answers again your committee by thirteen votes against four and with one abstention.

Upon the first of these two points the opposition seems to be stronger. With great force this clause of the reservation of vital interests is criticized; but it is so only because it has been found too elastic, and because arbitration is not then sufficiently obligatory. We but wish to follow, and it is through wisdom that we are not going farther.

Moreover, are we not entitled to the right to recall the fact that the German delegation itself admits in certain cases the usefulness, the moral worth of this clause; and does not the delegation itself admit the insertion of the clause in the provisions relative to the *compromis* before the permanent court?

We repeat it, it has but a moral worth, but is that worth negligible? And is it not precisely this of the reservation which, in the eyes of the civilized world, leaves to the Convention its high worth, without its resulting in peril for the legitimate interests of the various States?

Upon the second point an agreement is easier: everyone admits equally the principle of an arbitration case without reservation. But some call for time that they may take up the technical study of each of the cases proposed.

[87] At bottom but two things are contested:

1. The right, in the Convention itself, to call upon all the Powers to consent, for disputes of a legal nature, to recourse to obligatory arbitration under reservation of their essential interests, when, moreover, arbitration without reservation is included in all special treaties.

2. The right, either in an article of the Convention itself, or in a protocol annexed to this convention, to form the legal bond establishing arbitration without reservations for certain definite cases between the Powers which, on the principle of reciprocity, are already prepared to approve thereof.

In short, and for the disputes just referred to, we are willing to establish obligatory arbitration:

either between two States, taken in twos and treating outside of the conclusions reached by the Conference,

or even between all or part of the Powers represented here, on the condition that they assume no engagement, either in the universal convention for the pacific settlement of international disputes, or even in any form whatever, so long as this Conference shall not have adjourned.

Is it then an idle question of form that we are now discussing?

What is it we ask for?

The affirmation of the principle of obligatory arbitration for disputes of a juridical nature, with the right to make reservation for the vital interests of the States;

The affirmation that, for the civilized peoples, there are certain kinds of questions, either of a purely financial character, or connected with international interests common to all the peoples, for which we definitively desire that law should be the only rule between the nations.

Finally, we demand that those who have already decided in their own minds in this sense may here declare that opinion.

But what to us is of particular importance is the significance that may be attached to our acts, according as our signatures shall or shall not be found at the bottom of a "Hague Convention." It is important to us that it may not be said that the Second Hague Conference disbanded without having marked decisive progress in the cause of international arbitration.

In the note communicated by the Russian Government to the First Conference of 1899, eloquent reference was made to "that category of treaties always and necessarily expressing the concordance of identical and common interests of the international society."

In employing this expression, the Russian note had in mind universal unions—such, for instance, as the postal, telegraphic and sanitary unions, etc. . . .

But if there are between all the peoples these interests of a material, economic and sanitary character that are common to them all, and for the defense of which they feel there is a close solidarity between them, it may be stated that since 1899 they have equally recognized that there is between them an interest superior to all those just enumerated—or still better, an interest still more general and whose safe-guarding guarantees at the same time the protection of all the others; it is that of the maintenance of peace, of a peace established upon the respect of mutual rights, and without which all the other common possessions of the nations may find themselves compromised.

In 1899 the reporter of the Convention of July 29 stated that there is a "society of nations," and a pacific settlement of disputes between them is *the first object* of this society.

Now, gentlemen, it is at The Hague that this society has clearly taken conscience of itself—it is the Hague international institution that represents it
[88] in the eyes of the world; it is there that, both in the legislation regarding war and that regarding peace, the rules for the organization and the development of this society are being worked out, and, as it were, the code of its organic acts.

All that which is being accomplished here assumes the high significance of being the fruit of the common consent of mankind. Remember what our colleagues from Italy and from the Argentine Republic thought it their duty to do when but a few days ago they concluded one of the most complete and boldest obligatory arbitration treaties; they thought it best to communicate its text, in plenary meeting, to our Conference, as though they had recognized that the treaty would receive all of its value only after having here received the consecration of universal approval.

Is it, furthermore, possible for us to hope that by way of special agreement, we will ever come to formulas of understanding adequate to conciliate all the States?

Special negotiations, of course, run the danger that they may be differently worded, not only because they reflect the state of mind special to this or to that nation, but even because one Power may refuse to that other Power that particular concession which would place it, possibly, in a situation of inferiority for the future, when it will consent to assume the same engagement toward the totality of the States of the world, in view of the immense advantage assured to it in return by the superior guarantee of the universal understanding.

We are accused of being dreamers, and there are those who believe that universal arbitration conventions cannot be harmonized with the *real interests* of the policy of the various States.

We are told that a State is a historical product whose conditions of existence and of development cannot be subordinated to the bonds of a treaty concluded without special knowledge of the situation of the other contracting party. It is also said that it is not possible to agree that the *conditions of power* of a nation be changed or transferred; it is not possible that different conditions may be juridically determined by the articles of an abstract and impersonal convention.

In our discussions of the two Hague Conferences, we are not considering and we have never considered seeking to modify the conditions of power of the various nations, or to intervene in the legitimate development demanded by their historic tradition, their present forces and the future of their genius. In view of the fact that each nation is a sovereign person, in moral dignity the equal of the others, and, be it small or large, weak or powerful, having an equal title to the respect of its rights, an equal obligation to the accomplishment of its duties, the States of the world meeting at The Hague only seek to extend between themselves, as has been stated, the realm of right, and to guarantee to all, equitably, under the beneficent reign of peace, their natural evolution; in short, so to act that the development of each may freely but justly continue, that is to say, without violating the similar right of each of the others.

It is not a reverie, it is a truth of experience which is each day being proven between the nations as between individuals, that an ever closer network of common interests unites all living beings. The exchanges of all sorts: material, economic, intellectual and moral, do not cease to increase—and the resulting solidarity between the nations is so closely drawn in our day that any trouble occurring between any two of them in their relations of right and of peace has an immediate repercussion upon all the other nations.

Let us have here a center where those common interests are recognized and defined in universal conferences—where their mutual guarantee is insured by arbitration conventions or by conventions of international jurisdiction,—it will prove no threat against any of them but a safeguard for all.

[89] In consenting, as a prudent and wise measure, for objects clearly determined and chosen after a thorough examination, to submit to arbitral decisions conflicts that may cause between them certain differences of a juridical nature, the interpretation of certain conventions, and of the liquidation of certain claims, by thus establishing in their midst a realm open alike to every civilized state, subject exclusively and by obligation to the rule of law, the Powers represented at The Hague will not only promote decisively and more rapidly than by any other means the great cause of arbitration, but they will also declare, as they could not do in any other way, a common good-will to respect international law, a common feeling of the solidarity of their duties. And this will be, perhaps, the highest lesson which can be given to man.

Gentlemen, in the course of our labors I have too frequently felt the desire for understanding and the mutual good-will by which we are animated, not to hope for a definitive agreement between ourselves. (*Repeated applause.*)

His Excellency Mr. **Mérey von Kapos-Mére**: Kindly permit me to make a brief statement. The PRESIDENT stated but a minute ago that he would not,

as I have done, make a distinction between the strong and the weak. I wish to state that I am not the inventor of this distinction, and that the passage of my speech in question was the answer and even a polemic against a part of the address of another speaker.

The **President** reads aloud Articles 37 and 38 of the project of the revised Convention.

ARTICLE 37

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

ARTICLE 38

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.

(*No remarks.*)

The PRESIDENT asks his Excellency Mr. MÉREY VON KAPOS-MÉRE if he does not see any contradiction between the wording of Article 38 and that of 16 *a*.

The first delegate from Austria-Hungary having answered in the negative, the PRESIDENT passes to the reading aloud of the Anglo-American project,[1] and puts Article 16 *a* to a vote.

ARTICLE 16 *a*

Differences of a legal nature, and especially those relating to the interpretation of treaties existing between two or more of the contracting States, which may in future [90] arise between them and which it may not have been possible to settle by diplomacy, shall be submitted to arbitration, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute.

Article 16 *a*, put to a vote, is adopted by thirty-five votes against five, and four abstentions.

Voting for: United States of America, Argentine Republic, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Russia, Salvador, Serbia, Siam, Sweden, Uruguay, Venezuela.

Voting against: Germany, Austria-Hungary, Greece, Roumania, Turkey.

Abstaining: Japan, Luxemburg, Montenegro, Switzerland.

Article 16 *b* is adopted without remarks.

ARTICLE 16 *b*

Each signatory Power shall be the judge of whether the difference which arises affects its vital interests, its independence, or its honor, and, consequently, is of such a nature as

[1] Annex 72.

to be comprised among those which are excepted from obligatory arbitration, as provided in the preceding article.

The meeting closes at seven o'clock.

[The annex to this meeting (pages 91-95 of the *Actes et documents*), being an English text of the speech of Mr. CHOATE which appears *ante*, pp. 73-78, is omitted from this print.]

[96]

SIXTH MEETING

OCTOBER 7, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:15 o'clock.

Mr. **Gil Fortoul** and his Excellency Mr. **Luis M. Drago** who were absent on Saturday last, at the time of voting upon Articles 16 *a* and 16 *b*, declare that they vote in the affirmative.

His Excellency Major General **Urban Vinaroff** states that the Bulgarian delegation wishes, before voting, to explain its attitude.

The Bulgarian Government has always been and still is favorable to the extension of arbitration.

But we find ourselves to-day in the presence of two systems, adopted by different majorities in the committee of examination: the system of the Anglo-Portuguese proposition and the system proposed by the first delegate from Austria-Hungary.

The Anglo-American proposition includes various provisions which we find it impossible to admit, because, in our judgment, they denature the character of obligatory arbitration in matters of a purely juridical character.

Thus, to our great regret, and as all the articles of this proposition form a unit or a system, we cannot give it our adhesion.

The program of the day calls for the continuation of the reading of the articles of the Anglo-American project relative to obligatory arbitration.[1]

The **President** puts Article 16 *c* to a vote.

ARTICLE 16 *c*

The high contracting Parties recognize that certain of the differences referred to in Article 16 are by nature subject to arbitration without the reservations mentioned in Article 16 *a*.

Voting for, 33: United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic,
[97] Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Siam, Sweden, Uruguay and Venezuela.

Voting against, 8: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland and Turkey.

Abstaining, 3: Japan, Luxemburg, Montenegro.

Article 16 *d* is then taken up.

[1] Annex 72.

ARTICLE 16 *d*

In this class of questions they agree to submit to arbitration without reserve the following differences:

I. Disputes concerning the interpretation and application of conventional stipulations relating to the following matters.

His Excellency Count **Tornielli**: In the meeting of August 23, at the moment when in the committee of examination [1] we were about to discuss the article at present under discussion, I had the honor of calling the attention of the eighteen delegates there represented to the fact that we had before us two different and clearly stated opinions. The cause of the difference which had arisen seemed to me at the time of trifling importance.

Up to that time everyone had seemed agreed both upon the principle of obligatory arbitration and upon the existence of matters to which unrestricted arbitration might be applied.

At what point does this difference arise? It occurs when putting the principle into operation and with regard to the possibilities of the application of the system of the list, upon which no agreement could be reached. This system was not new. It had been presented to the First Peace Conference in 1899. It had not been accepted. It was brought up again and it led to the same difficulties.

In order not to give one's opinion with regard to the acceptance of the system, except upon thorough acquaintance with it, the Italian delegation, in a meeting of the committee held in the month of August, last, requested that the various points included in the list should be voted upon before the acceptance of the system itself were put to a vote.

Our distinguished President acceded then to our request. We believe that the position of the question has not greatly changed to-day, and, hence, that it will be necessary to vote in the first place upon the points, and afterwards upon the whole of the article.

His Excellency Mr. **Martens**: In the name of the Russian delegation, I have the honor to state that it will vote in favor of the proposition of the United States of America, and for the four following cases of the list:

a. Pecuniary claims resulting from damages when the principle of indemnity is recognized by the parties;

b. Regulation of commercial and industrial companies;

c. Civil and commercial procedure;

d. Private international law.

[98] With regard to all the other cases the Russian delegation will abstain from voting and for different reasons: one of these reasons is that Russia has not concluded any conventions upon this matter; and another is that several of these matters are not ready for the principle of obligatory arbitration.

In voting for the four cases of the list and for the proposition of General PORTER, I declare that the Russian delegation casts its favorable vote in view of unanimity. Unanimity is the productive force of all conferences, and for the Peace Conference unanimity is the vital force. It is because of these considerations that the Russian delegation is ready to sacrifice upon the altar of general understanding, all the cases that it shall have voted but that might not have secured the unanimity or the near unanimity of the votes.

[1] Meeting of August 23, of the committee of examination A of the first subcommission of the First Commission.

Moreover, I must state that for the Russian delegation, the question of obligatory arbitration is organically connected with the creation of an effectively accessible and open arbitration court.

For the great political questions reserved to optional arbitration, the principle of the free choice of the judges for each case in particular, is perfectly acceptable, in spite of the considerable expenses entailed by this manner of procedure; but in the hypothesis of obligatory arbitration which will be applied only to secondary questions of a juridical and technical nature, it is indispensable to have a court operating regularly and access to which would be easy and inexpensive.

The Russian delegation has not voted for the Convention for the Prize Court because the latter did not determine the law that would be applied by this court; for similar reasons it believes that the principle of obligatory arbitration cannot be realized without an accessible and open international court.

It will vote, therefore, in favor of the Anglo-American project under the benefit of the reservations which it has just made.

His Excellency Mr. **Asser** states that three of the cases accepted by the Russian delegation have not secured an absolute majority of the votes in the committee, and he wonders if they shall be submitted to the vote of the Commission.

The **President** replies that as a general rule a vote will be taken only for those cases that have secured such a majority; nevertheless, any member of the assembly has the incontestable right to call for a vote upon any item of the list.

His Excellency Mr. **Keiroku Tsudzuki** does not quite see the relation between Article 16 *d* and the proposition of General PORTER.

He wishes to state that he will vote for this proposition, provided it has retained its character of an obligatory measure before the optional recourse to armed force, and provided it forms an independent proposition.

The **President** declares that such has always been the intention of General PORTER.

He then puts to a vote the items of the list that have obtained an absolute majority in the committee.

His Excellency Mr. **Carlin** desires to have it understood that his participation in the vote does in no way imply his adhesion to the principle of the article.

No. 11. Reciprocal free aid to the indigent sick:

Voting for, 31: United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Mexico, Nicaragua, [99] Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Salvador, Serbia, Sweden, Uruguay and Venezuela.

Voting against, 8: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland, Turkey.

Abstaining, 5: Japan, Luxemburg, Montenegro, Russia, Siam.

The items: No. 6 (International protection of workmen); No. 7 (Means of preventing collisions at sea); No. 10 *b* (Weights and measures); No. 2 (Measurement of vessels); No. 3 (Wages and estates of deceased seamen) receive the same vote.

B. Article 16 a: Pecuniary claims for damages when the principle of indemnity is recognized by the parties

Voting for, 31: United States of America, Argentine Republic, Bolivia, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Sweden, Uruguay and Venezuela.

Voting against, 8: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland, Turkey.

Abstaining, 5: Brazil, Japan, Luxemburg, Montenegro, Siam.

No. 8. Protection of literary and artistic works.

His Excellency Count **Tornielli**: The difficulties that may arise with regard to the conventions concerning the protection of literary and artistic works seem to be of such a nature that they can be settled rather by a true permanent international judicial court than by an arbitral court. For this reason, the Italian delegation, which abstained from voting upon this part when the committee called for such vote, now renews its abstention.

Voting for, 27: United States of America, Argentine Republic, Bolivia, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Portugal, Haiti, Mexico, Nicaragua, Norway, Panama, Paraguay, Peru, Persia, Salvador, Serbia, Uruguay, Venezuela.

Voting against, 8: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland, Turkey.

Abstaining, 9: Brazil, Italy, Japan, Luxemburg, Montenegro, the Netherlands, Russia, Siam, Sweden.

[100] The **President** proposes a vote upon the whole of Article 16 *d*.

His Excellency Count **Tornielli** states that in their totality, the different categories adopted by the Commission do not seem to him to form a sufficiently important whole, and that the Italian delegation will abstain from voting upon Article 16 *d*.

The article is put to a vote.

Voting for, 31: United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Sweden, Uruguay and Venezuela.

Voting against, 8: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland, Turkey.

Abstaining, 5: Japan, Luxemburg, Montenegro, Italy, Siam.

The committee passes to the discussion of Article 16 *e*.

ARTICLE 16 *e*

The high contracting parties have decided, moreover, to annex to the present Convention a protocol enumerating:

1. Such other matters as appear to them at the present time to admit of embodiment in a stipulation respecting arbitration without reserve.

2. The Powers which now contract this engagement with each other with respect to such matters, in whole or in part, on condition of reciprocity.

The protocol shall likewise fix the conditions under which other matters may be added, which may be recognized in the future as admitting of embodiment in stipulations

respecting arbitration without reserve, as well as the conditions under which non-signatory Powers shall be permitted to adhere to the present agreement.

His Excellency Mr. **Carlin**: In conformity with the declaration which the Swiss delegation made day before yesterday, it will cast an affirmative vote for Article 16 *c*, but this vote must not be regarded as final unless by unanimous agreement this article were to be accepted as a basis of a general understanding. It goes without saying, moreover, that the modifications of the text that might be made necessary in detaching this article from those preceding it are likewise reserved.

The article is put to a vote and adopted by thirty-two votes against eight, with five abstentions.

Voting for, 32: United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Salvador, Serbia, Siam, Sweden, Switzerland, Uruguay, Venezuela.

[101] *Voting against*, 7: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Turkey.

Abstaining, 5: Italy, Japan, Luxemburg, Montenegro, Russia.

Captain **Luang Bhüvanarth Narübal**: The Siamese delegation, in voting in favor of Article 16 *c* has, in conformity with its previous declarations, shown its sympathy in favor of the principle of arbitration and, in the special case, in favor of the principle of obligatory arbitration.

But the instructions which it has received up to this day have not enabled it to take part in the successive voting that has just taken place upon matters of detail; and it is in this sense that its abstentions must be interpreted.

Mr. **José Tible Machado**: In connection with the extension of obligatory arbitration in favor of which I have voted in each case, the Guatemalan delegation would be very happy to see the majority already secured still and ever increased. But it believes it to be its duty, especially in view of the fact that the matter concerns one of the nations of Central America, to observe that at the first plenary meeting we unanimously adopted a regulation; that upon the request of his Excellency Sir Edward Fry, supported by our eminent President, it was also the sentiment in this meeting that, in view of the fact that the Conference is essentially a deliberative assembly, it was necessary that the nations participating therein should be represented on each occasion in order to vote, and, in consequence, that the delegation of one country might not assume the representation of another delegation, nor vote for any other country except the one which has granted it its powers.

I am greatly in doubt as to the correctness and the legality of the votes that have just been taken; and I would ask our eminent President to be good enough to inquire if the first delegate from Nicaragua is with us. I do not see him; but it seems to me that I clearly heard, at the call of the name of Nicaragua, replies and votes. If our Nicaraguan colleague is not among us, perhaps you would be kind enough, Mr. President, to have the votes corrected.

The **President**: The delegate from Nicaragua must be informed through the care of the secretariat.

Article 16 *f* is then taken up.

ARTICLE 16 *f*

It is understood that arbitral awards, in so far as they relate to questions coming within the jurisdiction of national courts, shall have merely an interpretative force, with no retroactive effect on prior decisions.

His Excellency Mr. **Asser**: I am able to state that the Government of the Netherlands could not accept this article adopted by the committee of examination by a majority of two votes, whilst there was omitted another article, proposed upon my initiative by the FUSINATO subcommittee, which in the committee of examination had been adopted by nine votes against three.

I shall not repeat what was stated in the committee of examination for and against this provision which lends itself to considerations of a very serious and very delicate juridical nature.

[102] It will be sufficient to observe that this article settles but a part of the very important question concerning the relation between international arbitral decisions on the one hand, and on the other, the acts of the national judicial and legislative powers: and, in my judgment, it disposes of the matter in a defective manner.

It does not seem desirable, it seems even dangerous, to insert here such a fragment of the system to be adopted; it will be better to subject the entire question to a studious examination; it is very complex and has not yet been the object of a special and thorough examination.

It may then be hoped that in a future conference it will be possible to determine precise rules with regard to this matter.

It is with this understanding that the Netherlands has cast its vote in favor of seven of the eight numbers of the list.

His Excellency Mr. **Asser** proposes to omit Article 16*f*.

His Excellency Mr. **Ruy Barbosa** states that he finds himself in the same situation as that predicated by his Excellency Mr. ASSER. He has supported the eminent delegate from the Netherlands in the advocacy of good principles which impose upon us the necessity of not compromising the authority of the national justice, and of the national legislature, by confusing the matters coming within their jurisdiction with those matters coming within the competence of international arbitration.

If it is thought that until now we have not reached a formula capable of clearly establishing the boundary line between their two fields of legitimate action, this is not a reason for hastily adopting an incomplete solution, and, because of its very insufficiency, one susceptible of misunderstandings.

It would in such case be much better to leave the question within the field of general and current rules of law than to be satisfied with a fragmentary, obscure and deceptive solution such as that of Article 16 *f*, as at present phrased.

In its present form it contains to a certain extent, which it is impossible to deny, an exact definition, for it denies to the decisions of international arbitration any retroactive effect upon previous judicial decisions. On the other hand, however, while attributing to them, in a general way, an interpretative value, this text would secure for them in the future an unlimited authority which might be looked upon as absolute, and, in that case, give rise to interpretations either of the judicial power or even of the executive power in each country which would be dangerous to the constitutional functions.

His Excellency Mr. Ruy Barbosa prefers, therefore, even as his Excellency Mr. Asser, the omission of the article.

With the article omitted, we shall remain in the present juridical situation, defined by the reservations of several delegations, especially that of Brazil, maintaining the competence of national justice, not only with regard to disputes already decided, but even with regard to those which, according to the constitutional law of each nation, come within the authority of its courts.

Within the natural circle of its action, the rôle of arbitration would not be lessened. Nor should we have compromised our work in favor of obligatory arbitration, as has been sought to make us believe here this day in the pessimistic analysis of our task in this matter.

Even in the cases of the Anglo-Portuguese list there are many in which, apart from the cases of private law with regard to which we cannot despoil the national jurisdiction in order to enlarge the field of arbitration to the detriment of the former, we meet with those dealing with the relations between one State and another, between one Government and another Government, between one administration and another administration and constituting the proper sphere of international arbitration by attributing to it a rather large scope.

[103] His Excellency Mr. **Beldiman** requests the privilege of the floor in order that he may add a few words in line with the argument of his Excellency Mr. Asser.

He desires to state that although the article was adopted in the committee of examination by seven votes against five, yet there were six abstentions. Therefore, eleven of the eighteen delegations have not adopted it, and under these conditions the article may almost be looked upon as having been rejected; its principle alone has secured an absolute majority.

His Excellency Mr. Beldiman states that in his own name he brings up the amendment proposed by his Excellency Mr. Asser; he is not indifferent to seeing how the difficulty that has arisen shall be settled, and he believes that under these conditions it is proper to put to a vote the proposition which he has just submitted.

His Excellency Mr. **Milovan Milovanovitch** declares that after having heard the reservations on the part of several States with regard to Article 16*f*, he believes it to be his duty as the author of this provision (which is but an amended British proposition), to participate in the discussions in order to find a means of understanding. He is firmly convinced that the provision under discussion yields a solution of an absolute juridical truth of the problem to which it refers. For it views the arbitral decision from two points of view: as a decision of an interpretative character and in so far as it is applicable to definite controversies. By its interpretative character the arbitral decision is a complement, an integral part of the Convention to which it refers, and like any other international treaty, it obligates the entire State, in its full personality, without any reason whatever for distinguishing between the cases of competence of its agencies exercising the various functions of its sovereign authority. By its applicative character the arbitral decision has the effects of a judgment. But in order to prevent any direct contact between arbitral decisions and decrees of the national courts, and unwilling that any sort of interference should arise between them, Article 16*f* deprives the arbitral decision of its applicative effect whenever a question arises for which

the national courts are competent. The decisions of the national justice thus preserve their full authority and force, and the arbitral decision does not invade the field reserved to judicial competence. The relations between an arbitral decision and the sentences of the national courts remain, therefore, in all things absolutely identical to the relations established between international treaties in general and the courts of the contracting States, in those cases when such treaties deal with matters that come within the competence of the courts.

But inasmuch as the uncertainties and the doubts expressed with regard to this matter by certain delegations have not yet disappeared, I believe that it would be best to omit this article and I request the delegations that have voted for it to be good enough to make this sacrifice. The field of action will thus remain open, without any obstacles, so that in practice there may be formed such doctrine as will best answer the nature of the arbitral decision and the rôle for which it is destined in international law. As for myself, I am convinced that the result would be entirely in conformity with the solution proposed by Article 16 *f*.

His Excellency Mr. **Asser** thanks his Excellency Mr. MILOVAN MILOVANOVITCH for the conciliatory manner in which he called for the omission of this Article 16 *f*, and he is pleased that his Excellency Mr. BELDIMAN is willing to bring up again his proposition adopted by the committee of examination; but it seems to him to be more practical not to attempt to solve this very important question on this day, but to subject it to still further study so that it may be ripe for action at the next Conference.

His Excellency Count **Tornielli** has requested the privilege of the floor merely to support the remarks made by His Excellency Mr. ASSER. The Italian delegation, even as the delegation of the Netherlands, believes it better
[104] that the matter envisaged by the article in discussion should be reserved for another time, since at the present time the necessary general approval required to solve it is wanting.

His Excellency Sir **Edward Fry** states that the British delegation in voting for Articles 16 *d* and 16 *e* understands that arbitral decisions, in so far as they relate to matters coming within the competence of national justice, will have but an interpretative value, without any retroactive effect upon previous judicial decisions.

His Excellency Baron **Marschall von Bieberstein**: I must confess that I no longer understand what is going on here. We have just adopted a list containing a series of treaties, the interpretation and application of which must devolve upon an international arbitration court.

These treaties concern industrial and literary property, etc., but hitherto this interpretation and this application belonged exclusively to the national jurisdictions.

The evil to which I called attention day before yesterday remains therefore intact; we are merely adding international jurisdictions to national jurisdictions.

We are pulling down our hats over our eyes in order that we may not see; we omit the provision in order to avoid the difficulty. The solution offered by Article 16 *f* was wrong, in my judgment; but it was a solution. If we omit it by putting two jurisdictions in opposition with each other, we create a real legal tangle.

His Excellency Mr. **Beldiman** demands that everyone take an attitude

towards this matter and requests the President to put to a vote the proposition of his Excellency Mr. Asser which he has just brought up again in the name of the Roumanian delegation.

For the reasons he has just stated, his Excellency Mr. **Asser** finds that he cannot vote in favor of his own proposition and hopes that the Commission will not adopt it.

His Excellency Mr. **Francisco L. de la Barra**: The Mexican delegation will vote against Article 16 *f*, if it is put to a vote, for the reason that it desires that the national courts should have as wide and complete a jurisdiction as recognized in international law, as a manifestation of their sovereignty.

His Excellency Mr. **Ruy Barbosa**: I fully agree with the declaration just made by his Excellency the delegate from the Netherlands. In this sense, I have had the honor of addressing to the President a letter on the very day of the vote upon this article in the committee of examination.

In maintaining the reservation which it has repeatedly made, the Brazilian delegation declares that in adopting the clauses of this draft Convention it does not mean to assume the obligation to submit to arbitration disputes referring to international stipulations, the application and the interpretation of which come within the jurisdiction of the national courts.

His Excellency Mr. **Mérey von Kapos-Mére**: In my turn, I should say a few words regarding the matter of omitting Article 16 *f*. The provisions included in this article have formed the object of a long discussion in the committee of examination. If to-day I believe that the result of this long discussion is *nil*, I wish at the same time to place the proofs of this fact before you. The committee of examination was to choose between two texts, one worked out by Mr. Milovanovitch, and the other presented by Mr. Asser. By a small majority, the committee decided in favor of the phraseology proposed by the Serbian delegate. Now Mr. Milovanovitch has just called for the omission of this article of which he is the author, and Mr. Asser has opposed the
[105] proposition of the first Roumanian delegate who desires to have the text at present inserted in the draft Convention replaced by the so-called Asser formula. Under these circumstances, am I not entitled to ask of those desiring to omit Article 16 *f* and to hold in abeyance the question which is therein settled: is it possible to accept the ensemble of provisions regarding obligatory arbitration while leaving undecided the question as to what would be the effect of arbitral decisions that have been rendered? This gap shows by itself the entire impossibility of this system.

Mr. **Georgios Streit**: I would call the attention of the Commission to the consequences that would result from the absolute omission of Article 16 *f*—this is exactly in the sense of the declaration of his Excellency the first delegate from Great Britain. To this end it is perhaps well to recall what took place in the committee of examination. The present Article 16 *f* contains a restriction; it establishes, in so far as they relate to matters coming within the competence of the national justice, that arbitral decisions have an interpretative value and no retroactive effect. At the second reading it was substituted for another article which had been adopted in the first reading and which restricted obligatory arbitration to those cases dealing with obligations to be carried out by the Governments or by the administrative agencies. It is clear that the new formula is less restrictive than the first which sought to exclude obligatory arbitration for all

cases coming within the sphere of the national jurisdiction. I did not ask for the privilege of the floor for the purpose of supporting this more restrictive formula. I find that there is no incompatibility between the two jurisdictions; like any other international pact, an arbitral decision, in my judgment, imposes itself upon all the powers of the State, no matter whether or not these powers are independent of each other, according to the constitution of the State. This interdependence does not concern international law. An international convention and an arbitral decision restrict the sovereignty of the State which, of course, has voluntarily consented thereto; thus, an international convention and an arbitral decision restrict also the various powers of the State which are not more sovereign than the State itself, and which constitute but functions of the State. But these ideas do not seem to have prevailed in the committee, a majority of whom was of opinion that a restrictive provision is necessary, and if I have permitted myself to take the floor, it was merely for the purpose of indicating that the omission of the Article would not conform to this opinion of the majority; it seems to me that in order to meet the views of the majority, a provision giving precision to these views should be inserted, in case Article 16 *f* should be omitted.

Mr. **Louis Renault**: On hearing of the fears that it arouses and the precautions with which it has been sought to surround it, one would clearly think that arbitration is a monster which has been unknown up to this day and which we must muzzle.

Arbitration has, however, operated for a long time, and never has there been occasion to witness any perturbations created by it within the international jurisdiction.

It has for its object to settle disputes between States—and, in principle, it does not affect disputes between private individuals. From this it follows that the decisions of the national courts will not be directly invalidated.

Why, in connection with a universal treaty, should difficulties arise that were unknown under the régime of special treaties? Is it because the signatories will number forty-five instead of two? But the nature of arbitration does not change according to the number of contractants.

I cannot therefore understand the difficulties that it is feared will be encountered, and although I am somewhat familiar with the settlement of international differences, I cannot see the " legal tangle " into which we are likely to be involved.

The Commission need have no fears: the past is a guarantor of the present and of the future. No injury will come to the prestige and to the
[106] autonomy of the national judicial decisions. Arbitration has proven itself an instrument of concord from State to State, and there is no reason to fear that it may become a cause of legal conflict because it may be simultaneously extended to several Powers. (*Applause.*)

His Excellency Baron **Marschall von Bieberstein** would reply in a few words to his eminent colleague Mr. Louis Renault.

Arbitration has indeed existed for a long time without ever having led to such difficulties. Now, however, we are no longer dealing with special treaties, but with a world treaty, and such a treaty cannot be concluded without settling the important question contained in Article 16 *f*.

Two solutions were presented to the committee of examination; that of the Fusinato committee, and that of Article 16 *f*. Now it is desired to lay aside

both of them and to leave the matter in abeyance. This is inadmissible, especially in a convention whose primary object it shall be to settle disputes by pacific methods.

His Excellency Mr. **Luis M. Drago:** As I have already stated in the meeting of day before yesterday, I believe that we are concerning ourselves over much with possible conflicts between arbitral decisions and local jurisdictions. An arbitration treaty which is an engagement between States creates international obligations of a political nature.

Contracted by the Department of State, which has been charged with the direction of foreign affairs, it is to the Government and not to the courts of one of the parties that the other party must address itself in case it believes that a decision has been handed down in contradiction with the letter or the spirit of the treaty. The courts in the exercise of their functions have but to apply the municipal laws of the State in the cases which are submitted to them. But treaties are nothing else but laws for the local jurisdictions.

In no case have the courts to take into account either the international aspect of treaties or the consequences which this or that judicial interpretation of its terms might give rise to. If this interpretation is of such a nature as to decide one of the contracting nations to interfere for the defense of those coming within its jurisdiction, it would certainly not take the question before the judicial department in order to safeguard the international stipulations contracted between one State and another. It would have to resort to the necessary diplomatic steps with regard to the political department, to obtain from the latter either a new law, or an authentic interpretation of the law from the national legislature, an interpretation that would make it unnecessary to consider the decrees in the sense objected to. If the State with regard to which diplomatic steps are resorted to does not think that an interpretative text is necessary we would then be able to decide through arbitration as to whether or not the decision was a political violation of the treaty, and whether or not the legislature would or would not be able to define by laws the meaning to be attributed in the future to the international convention, respecting, at the same time the thing adjudicated, and settling, if necessary, the prejudices that the decision of the local jurisdictions might have occasioned.

It is thus seen that the courts preserve their complete and absolute independence; they confine themselves, in the customary way, to applying the laws, the treaties which from the internal point of view, are neither more nor less than another form of laws, and finally the authentic interpretations of their legislature. Thus, the uniformity of jurisprudence is assured without any need of fearing the slightest disrespect for the national judges. Our apprehensions, let me state once more, are carried too far, and I do not believe that it is necessary to foresee difficulties which, as but a little while ago was stated by our eminent colleague Mr. Louis Renault, have never been encountered in a very long experience with treaties and with arbitral decisions.

[107] His Excellency Sir **Edward Fry** states, in the reply to the objections of Baron Marschall, that the treaty concluded between Germany and Great Britain in July, 1904, aims to submit to arbitration all the differences of a juridical nature or relative to the interpretation of treaties existing between the two contracting parties that might arise between them in the future and not merely

the differences that have already arisen and with whose nature the contracting Powers were acquainted.

His Excellency Baron **Marschall von Bieberstein** observes that the Anglo-German arbitration treaty just referred to by his Excellency Sir EDWARD FRY has not hitherto been applied a single time. In consequence it cannot be considered as a basis for proving that the difficulties in discussion do not really exist. But now that these difficulties have been observed, it is necessary to take them into account.

Furthermore, I take note of the declaration of so eminent an English jurist and judge as the first delegate from Great Britain, that arbitration is applicable even to cases that have been previously decided by an English court.

The **President** has been much impressed by the fears that have seemed to exist among certain ones of his colleagues, and he has been wondering if, after all, we are going to be plunged into that juridical condition which has been so harshly qualified.

He does not believe so. The statement made with regard to the situation seems to him incomplete.

It seems that it is, in effect, being said: the arbitration project upon which we are voting will have neither meaning, nor occasion for application for lack of Article 16*f*, the omission of which is being considered.

One thing remains uncontroverted: it is that without any difficulty whatever, arbitration is applied to the acts of the Governments themselves and this field of application of arbitration we cannot neglect to consider. Arbitration has already operated with regard to universal treaties: certain of these treaties provide for a *compromis* clause and assume that governmental or administrative acts will be submitted to arbitration.

Here, then, we have a limited but substantial field of application. Are we to extend arbitration beyond this field? We are divided as to this matter. But, in view of this divergence of opinion, are we to leave it to jurisprudence to settle the difficulty? In short, the disagreement exists upon one question more or less. But no fear need be entertained by those who absolutely cling to the respect for judicial decisions: the common law does not permit of their being affected retroactively. As to the future, we must take counsel together.

Summarizing the situation, I may state there is agreement between us all that arbitration should be applied to the acts of the States and that the decision should be rendered between two States. There is no difficulty with regard to this matter. The indefiniteness which still rules in the doctrine concerning the relations of arbitral decisions and special decisions has in no way been responsible for the juridical confusion referred to, in spite of the numerous arbitration treaties already concluded. At all events, this confusion is too hypothetical to cause us to lose the tangible benefit of arbitral justice. (*Applause.*)

His Excellency Mr. **Beldiman**: I hear the postal convention frequently referred to; but it seems to me that those who do so have not thoroughly studied its text. I take the liberty, therefore, of reading its Article 23 aloud.

[Here follows the reading of Article 23.]

Arbitration is therein limited, as we have heard it said, to the affairs of the postal administration; Article 23 does not make of the Postal Union a world

arbitration treaty; recourse to an arbitral court is in it provided only for differences between postal administrations.

[108] As regards the statement just made by our President it seems logical to infer from it that he desires not only to omit Article 16 *f*, but to replace it by the first text proposed.

The **President**: It is evident from the expression of my thought that it is better not to put anything at all in its place, and to leave the matter with international jurisprudence.

His Excellency Baron **Marschall von Bieberstein** feels that we cannot speak of a uniform international jurisprudence as long as there is no really permanent court; on the contrary, we must accept a series of diverging arbitral decisions.

His Excellency Mr. **Mérey von Kapos-Mére**: A little while ago I stated that the omission of Article 16 *f* presents a very serious gap and makes the proposition of the committee of examination even less acceptable.

The omission of this article would result in leaving upon the mind doubts as to the scope of arbitral decisions rendered in disputes, the object of which does not come exclusively within the field of the executive power.

The words which our President has just uttered have but confirmed me in my opinion. For they indicate clearly that my interpretation was correct and that for one-half of the cases, that is to say, for those in which international jurisdiction is involved, the effect of the arbitral decision would continue to be controverted. I have desired to make this statement because the cases in question are the most important.

His Excellency Mr. **Martens** also finds Article 16 *f* of no use. He refers to the case of an Italian sailor who died in America and whose estate should be settled by the American courts. It is certain that the decision given by the American court could not be invalidated by an arbitral decision. But if the Italian Government were dissatisfied with the interpretation given by these courts to an Italo-American convention dealing with the succession of sailors, it might call for arbitration in the matter, and the arbitral decision, in the opinion of Mr. MARTENS, should have an interpretative effect for the future, and it is in this sense that international jurisprudence will be developed without the need of the special indication of Article 16 *f*.

His Excellency Mr. **Asser** desires to have it understood that the negative votes upon the proposition of his Excellency Mr. BELDIMAN must not be regarded as having been cast against its principle; but they must be interpreted as in opposition to its insertion into the Anglo-American project.

His Excellency Mr. **Beldiman** declares that up to this time he has been unable to understand why the proposition of Mr. ASSER was rejected in committee.

His Excellency General **Horace Porter** states that in accordance with the definitive instructions which he has just received, the delegation from the United States cannot accept the amendment proposed by his Excellency Mr. BELDIMAN.

The **President** puts the amendment of his Excellency Mr. BELDIMAN to a vote.

He states, in conformity with what his Excellency Mr. ASSER has said, that

the defeat of this proposition must be regarded as the expression of the desire of the Commission to see no action taken with regard to the question contained in Article 16 *f*.

The proposition of his Excellency Mr. BELDIMAN is defeated by twenty-three votes against eight, with twelve abstentions.

[109] *Voting for,* eight: Germany, Austria-Hungary, Belgium, Bulgaria, China, Roumania, Switzerland, and Turkey.

Voting against, twenty-three: United States of America, Argentine Republic, Bolivia, Colombia, Cuba, Denmark, Ecuador, Spain, France, Great Britain. Guatemala, Mexico, Norway, Panama, Peru, Persia, Portugal, Russia, Salvador. Serbia, Sweden, Uruguay, and Venezuela.

Abstaining, twelve: Brazil, Chile, Dominican Republic, Greece, Haiti, Italy, Japan, Luxemburg, Montenegro, Paraguay, the Netherlands, and Siam.

In consequence, Article 16 *f* is laid aside.

ARTICLE 16 *g*

It is understood that stipulations contemplating arbitration which appear in treaties already concluded or to be concluded, shall remain in force.

His Excellency Count **Tornielli**: The Italian delegation requests that Article 16 *g* be put in another place and inserted after Article 16 *l*. The reason for this request is quite evident. The reservation contained in Article 16 *g* must include the whole of the Convention and especially Article 16 *k*, and not merely the first Articles from 16 *a* to 16 *f*.

The article is adopted without further remarks.

ARTICLE 16 *h*

If all the States signatory to one of the conventions mentioned in Articles 16 *c* and 16 *d* are parties to a suit concerning the interpretation of the convention, the arbitral award shall have the same force as the convention itself and must be equally well observed.

If, on the contrary, the dispute arises between only a few of the signatory States, the parties in dispute must notify the signatory Powers a reasonable time in advance, and the latter Powers have the right to intervene in the case.

The arbitral award shall be communicated to the signatory States which have not taken part in the case. If the latter unanimously declare that they accept the interpretation of the point at issue adopted by the arbitral award, that interpretation shall be binding upon all and shall have the same force as the convention itself. In the contrary case, the award shall be binding only upon the Powers in dispute, or upon such Powers as have formally accepted the decision of the arbitrators.

(*No remarks.*)

ARTICLE 16 *i*

The procedure to be followed in adhering to the principle established by the arbitral award, as provided in paragraph 3 of the preceding article, shall be as follows:

If a convention establishing a union with a special office is involved, the parties taking
[110] part in the case shall transmit the text of the award to the special office through the State in whose territory the office is located. The office shall draw up the text of the article of the convention to accord with the arbitral award, and forward it through the same channel to the signatory Powers that have not taken part in the case. If the latter unanimously accept the text of the article, the office shall make known their acceptance by means of a protocol, a true copy of which shall be transmitted to all the signatory States.

States whose reply has not reached the office within one year from the date on which the office forwarded the text of the article, shall be considered as having accepted it.

If a convention establishing a union with a special office is not involved, the said functions of the special office shall be performed by the International Bureau of The Hague through the Netherland Government.

It is understood that the present stipulation in no way affects arbitration clauses which are already contained in existing treaties.

Mr. **James Brown Scott** calls for the omission of paragraph three of Article 16 *i*.

His Excellency Mr. **Nelidow** wonders what would be the situation of the States that might not have replied to the communication made by the bureau.

The **President** states that such States retain their freedom of action.

The requested omission does not bring forth any objection and the article is adopted without paragraphs two and three.

Article 16 *k* is then taken up.

ARTICLE 16 *k*

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure, and the periods to be observed in the matter of the constitution of the arbitral tribunal.

His Excellency Count **Tornielli**: The Italian delegation stated in the committee that different opinions are held regarding the nature to be attributed to the special act termed the *compromis*. Although Article 16 *k* can evidently not be applied to other conventional acts apart from the one of which it is itself a part, the royal delegation cannot admit in so absolute a form a provision which is in contradiction to the clauses that Italy has included in a goodly number of its really obligatory arbitration treaties. It abstains, therefore, from voting upon this article.

His Excellency Mr. **Hammarskjöld**: For the reasons stated in the course of the discussions of committee A,[1] I hold that the insertion of the words "conformably . . . signatory Powers," is at least useless. The Swedish delegation finds, therefore, that it must abstain[2] from voting upon Article 16 *k* with these words included.

I take the liberty of adding that this article seems to duplicate Article 52 which, for all arbitration cases, settles the matter of the *compromis*.

The continuation of the discussion is adjourned to the afternoon meeting.

The meeting closes at 12:15 o'clock.

[1] Report, vol. i, p. 490 [489].
[2] Vol. i, p. 533 [533].

[111]

SEVENTH MEETING

OCTOBER 7, 1907

(*Afternoon*)

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The discussion of Article 16 *k* of the Anglo-American project[1] is continued.

His Excellency Mr. **Mérey von Kapos-Mére**: I would like to state my opinion with regard to Article 16 *k*, and, at the same time, reply in a few words to a part of the discourse pronounced by Mr. RENAULT day before yesterday. The Commission may possibly think that I am lacking in modesty if, being so little of a jurist as compared with our eminent colleague, I dare launch forth into a polemic against a specialist of such high authority. I have two excuses, however, that will justify my boldness: the first is that, belonging to the minority, I desire to substitute for the number of votes that we lack the force and justice of our arguments; and the second is that Mr. RENAULT has made my task altogether too easy, so easy indeed that I cannot withstand the temptation to reply.

In the second part of his discourse, Mr. RENAULT spoke of the *compromis* and endeavored to show, among other things, that the difficulty created by the attitude of the American Senate did not really exist, and that for arbitration treaties the situation of the Government of the United States was the same as that of any other Government whatever. But I have always maintained and I am continuing to maintain the contrary opinion.

In support of his thesis, Mr. RENAULT cited the case of the *Alabama*. It is evident that in this case the matter involved was quite of a different type. The establishment of the *compromis* was not involved; the matter involved was merely the execution of the arbitral decision, the payment of the amount which the arbitrators had fixed. Now, not only has no one expressed any doubt as to the question of knowing whether, in an arbitration case, the decision would be executed, even if this execution depended also upon a vote of a legislative body; on the contrary we have fortunately held that it was not even necessary to provide for the case when an arbitral decision might not be executed. But the question raised by the attitude of the Senate of the United States is an entirely different one. It concerns the difference existing between the situation of countries in which the establishment of the *compromis* is left to the executive
[112] power, and that of the United States and of other American States—whose constitutions are modeled after the Constitution of the United States—where the *compromis* must be submitted for the approval of a legislative body.

[1] Annex 72.

Although leaving it an open question as to why they thought it necessary to insert this article which, for the other States, would be of no importance and of no effect, the delegates from the United States have always given us to understand that in their judgment the difficulty in question was, so to say, forced into the discussion, that it was but a question of good faith, and that as far as good faith is concerned, we might have full confidence in the American Senate. For my part, I wish to state that I have this confidence, fully and sincerely. But I maintain at the same time that we are not dealing simply with a question of good faith, and that the difficulty exists nevertheless. Permit me to trace once more the historical aspect of these arbitration treaties that have disclosed the difficulty in question and that have led us up to the provisions of Article 16 *k*.

At a given moment, the Government of the United States proposed to several Powers, among others to Austria-Hungary, the conclusion of arbitration treaties. I shall confine myself in my references to the treaty which was to be concluded between the United States and Austria-Hungary, and the only one of these treaties with whose vicissitudes I am acquainted. This treaty had already been negotiated and signed when the American Senate claimed that every *compromis* must be submitted to it. Surprised by this attitude of the Senate, the Government of the United States declared to our Government that in these conditions it was not in position to ratify the treaty. In taking the liberty of referring to this case which in my judgment is very significant, it is not in order to reproach the cabinet of Washington for not ratifying the treaty in question. I wish merely to state the *reasons* that determined the Government of the United States to decline at the time, and of its own initiative, to ratify this treaty, and to show that at that time the attitude of the American Senate was considered by the Washington cabinet itself, as a difficulty in the way of enforcing an arbitration treaty. In this respect, the attitude of the Government of the United States was, therefore, altogether different from the one that has been here presented both by the American delegation and by Mr. RENAULT.

Mr. **James Brown Scott** declares first that the American delegation is always happy to receive enlightenment and to learn something new about American constitutional law; for the objection to the *compromis*, that is, to the framing of the issue, is really an objection of a constitutional nature. The formulation of the *compromis*, to which so much importance is attached, is in our view merely a question of internal law, and we understand neither the reason nor the desire to make it a question of international law. From an international standpoint but one thing is important, namely, that the special agreement to arbitrate be concluded; but it is a matter of indifference by which branch of the Government this is done. Whether it is the act of the President or of the Secretary of State, his delegate, or the work of the Senate, or whether it requires the happy cooperation of the Senate and the President, matters little, for each of these organs acts in the name of the Government. The agreement to arbitrate is a governmental act, and international law applies only to a nation, and not to its organs, which have no personality in the law of nations.

We are told that there is a marked difference between the manner in which the agreement to arbitrate is concluded in a monarchy and the system which prevails in a republic, and much distrust is expressed regarding the latter. We cannot share this view. What does it matter whether the agreement to arbitrate is the act of an emperor or of his delegate, or whether it is the act of a limited

body or even of the whole legislature? The main thing is that it be con-
[113] cluded, and the manner of concluding it is indifferent, as is also the organ of the government charged with this duty by the laws and constitutions of the various countries.

It seems to us, moreover, that in attacking the *compromis* the existence of the treaty of arbitration is lost sight of. The *compromis* is in reality nothing without the treaty, for it is the treaty which creates an obligation to conclude it. Before concluding a *compromis* there must be a treaty of arbitration which has been ratified by the proper authority (in the United States, the Senate) after having been negotiated by the executive. It is only then that there exists a *juris vinculum*, the famous legal obligation so often mentioned by the irreconcilable and undaunted enemies of every stipulation for arbitration. When a particular case arises there exists, by virtue of a treaty an obligation to conclude the *compromis*, but it is a general obligation; the legal obligation in such a case only comes into existence when the two nations bind themselves, or rather have bound themselves, by concluding the special agreement to arbitrate. If one of the two parties refuses to conclude this, it is clear that the other will not be obligated. How can it be asserted that one of the two nations can be bound if the other is not? The *compromis* is a special compact between two contracting parties, and as such it necessitates diplomatic negotiation, terminating in an understanding upon the form and the purport. Then only is the *juris vinculum* formed. If, for instance, a European nation is ready to conclude a *compromis* and presents a formula, it is not bound until its partner, for instance the United States, has accepted the terms of the formula. But, on the contrary, if we suppose that, as is not at all improbable, the United States proposes the formula, there will be no obligation until the European nation, the empire of Austria-Hungary, has declared its acceptance of it. Before this there is nothing but a tentative proposal, there is no obligation contracted regarding the special subject of the controversy, and there is only a general obligation arising from the treaty of arbitration binding alike the two signatory Powers.

The opponents of arbitration reproach us with not furnishing them the *juris vinculum* necessary for their protection. More generous than even they desire, we are willing and ready to offer them not one *vinculum*, as they ask, but two, namely, one arising in the general treaty, and another resulting from the special *compromis*.

The fears of monarchical nations are therefore wholly unfounded. The *compromis* does not arise automatically. The two parties can only be obligated concurrently by their mutual consent, and no inequality can therefore exist between them. There is in reality no actual obligation upon which a material execution can be based, until the question, regarding which the *compromis* has been concluded, is submitted to the arbitrator and an award has rendered the *compromis* executory. If the *compromis* is not concluded, there is no foundation for the arbitral award and no one is bound by a non-existent judgment. Therefore when a monarchical nation sees a danger to itself in its readiness to conclude a *compromis*, it is frightened by an imaginary peril.

Moreover, instead of discussing the way in which the *compromis* should be concluded, which is irrelevant to the present purpose, it would be much more

appropriate to point out the cases in which the United States has refused to conclude a *compromis* after binding itself so to do by a general treaty of arbitration. Not a single instance of such a refusal has been cited. It is therefore to be inferred that none such exist, for otherwise, with the profound knowledge of the constitutional and diplomatic history of the United States possessed by our learned adversaries, they would not have failed to point them out. It is common knowledge that the United States has always been willing to conclude treaties of arbitration. Recourse to arbitration is our favorite method of settling international disputes, and our marked success whenever we have submitted them to arbitration furnishes the best demonstration of the fact
[114] that our country is in an excellent position to conclude the *compromis*.

There is surely no need at The Hague, in the very city where the United States has successfully resorted to the august tribunal here established, to dwell longer upon this point.

We do not pretend that the conclusion of the agreement to arbitrate never presents a difficulty, but we do maintain that this difficulty is technical, not legal. It may well be that a monarchical country can overcome this difficulty more easily if the conclusion of the *compromis* depends in its case solely upon the will of one individual. Nevertheless it cannot elude it, for even a monarch or a minister must, as well as a collective body or a parliament, weighs the *pros* and *cons* and considers whether the *compromis* is or is not acceptable. The treaty of arbitration does not make it obligatory to conclude any but an acceptable *compromis,* and any other will be rejected by an individual will as well as by the will of a collective body. It may frequently happen that the preparation of the agreement by the latter requires more time, because the complex organ moves more slowly than the individual body. The difficulty, however, is not one of an international legal nature.

In its final analysis, whatever be the form of government, the question of the formulation of the *compromis* resolves itself, from the standpoint of international law, into a question of good faith. Every power which signs a clause of arbitration can obviously evade it, but there is no reason to suppose that the legislative body is less mindful of obligations assumed than are executive organs, or that a country with a parliamentary form of government is more inclined to violate its engagements than a country whose constitutional form of government is of an autocratic character. Whenever and wherever good faith exists, the settlement of the *compromis* can only be a question of time. Complications of an internal character will by no means prevent a nation careful of its honor from fulfilling its engagements. On the basis of international law the nation with which it has contracted can ask nothing more. The means of action furnished by the law of nations stops at the frontiers, and the foreign State may not concern itself about the manner in which the obligation, whose fulfillment it seeks, shall be executed. It is for the cocontracting State alone to determine the means of meeting its international duties.

These truths are so self-evident that the article of the American project which has given rise to this discussion may well seem superfluous, but we have thought it advisable and necessary to dwell on this point in order that no misunderstanding shall arise regarding the delay which may sometimes be necessary in order to secure the cooperation of an internal body, for instance, in the United States, the Senate, which is alone competent to approve treaties negotiated by the executive.

It may be, however, that it will not be necessary in every instance to submit the *compromis* to the Senate. This does not always happen in actual practice, and it has been observed that in the recent arbitration of the Pious Funds case and in the Venezuelan controversy the *compromis* was not submitted to the Senate. We have, however, felt obliged to reserve the right to submit the *compromis* to the Senate, and loyalty has compelled us to inform the Powers of this reservation. The reservation, however, merely means that the conclusion of the *compromis* is subject to the provisions of the Constitution and the internal laws, which would seem to follow as a matter of course. Therefore in reserving the right in express terms we are actuated solely by a desire to avoid any possible misunderstanding, which might result in incriminations or recriminations likely to engender a suspicion of bad faith. For this reason we have thought it necessary to explain the situation frankly and fully, as it appears in the constitutional theory and practice of our country.

His Excellency Mr. **Mérey von Kapos-Mére:** Permit me a few words in reply to Mr. Scott. Our honorable colleague has only repeated the argument previously advanced in the discussion of this question in the committee of examination.

[115] But I note that he has carefully evaded my question which was, however, simple and to the point: Why did the cabinet of Washington refuse on its own initiative to ratify the treaty of arbitration concluded with Austria-Hungary unless by reason of the difficulties it foresaw on the part of the American Senate?

Mr. **James Brown Scott:** The policy of the United States is not a subject for discussion in an international peace conference.

Article 16 *k* is adopted by twenty-six votes against seven, and nine abstentions.

Voting for: United States of America, Argentine Republic, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Persia, Portugal, Salvador, Serbia, Switzerland, Uruguay, Venezuela.

Voting against: Germany, Austria-Hungary, Belgium, Bulgaria, Roumania, Russia, Turkey.

Abstaining: Greece, Italy, Japan, Luxemburg, Montenegro, Norway, the Netherlands, Siam, Sweden.

Absent: Bolivia, and Nicaragua.

The committee takes up the discussion of Article 16 *l*.

ARTICLE 16 *l*

The stipulations of Article 16 *d* cannot be invoked in any case where the interpretation or application of extraterritorial rights is involved.

His Excellency **Samad Khan Momtas-es-Saltaneh:** At the very beginning of the discussion of the principle of arbitration, we explained the attitude of our Government with regard to this principle, and since then we have availed ourselves of every opportunity to reiterate them. We have stated both frankly and sincerely that, from our point of view, arbitration was the most efficacious and perhaps the shortest way to attain the ideal object of peace and of security. We have already expressed ourselves with great appreciation as to the merit of some of the propositions made in this regard in the Conference, and we have declared

without hesitation that we are ready to follow the champions of this great cause however far they may go toward the zenith of this principle. I have taken special pains to support the whole of the proposition presented in the name of Great Britain, and I am glad again to express my best wishes for its adoption. But it will surprise no one to hear me state now that we should regret to see Article 16 *l* of this proposition accepted. This article expressly excludes from the stipulation of Article 16 *d* the interpretation or the application of extraterritorial rights. Why then this distinction of classes and how are we to explain it? My duty as the representative of one of the nations referred to by this article, forbids me to remain silent with regard to this matter, and in spite of my willingness to sacrifice and conciliate which has been fully proved by my vote of this forenoon, I feel compelled to present my objections with regard to this article. I cannot believe for a moment that the authors of this proposition are not convinced
[116] of the equity and of the impartiality of an arbitral decision, and I believe even less that it is their intention expressly to refuse to us this equity and this justice. Why then compromise the life and the growth of this great humanitarian work which requires still much sacrifice and care, especially on the part of its authors. Can it be admitted that in a world convention there should be inserted an article excluding from the justice therein proclaimed some of the signatories of this Convention? What advantage is there in arousing, through the insertion of this article, in the future arbitration convention a certain distrust on the part of those nations whose representatives have with enthusiasm followed the eminent messengers of this project? In the very interest of the cause that we here defend I am certain that I am the interpreter of several of our colleagues in appealing to the representatives of the great and liberal nation from which this article emanates, and to the impartial consideration of this high assembly. By accepting its omission, the illustrious Dean of the jurists of the Conference would ensure not only the adhesion of several States, but once more he would proclaim the sincerity of the very high sentiments of international equity and concord that have inspired the authors of the proposition which has been submitted to the high assembly. He would thus succeed in satisfying the national sentiment of some of us, and would encourage us in the way itself that we have hitherto followed.

Gentlemen, I ask therefore that Article 16 *l* be omitted.

Mr. **Corragioni d'Orelli:** On the occasion of the general discussion of the propositions that have been laid before you, the Siamese delegation reserved the right to state the reasons that have compelled it to make reservations with regard to Article 16 *l* when the project itself should be brought up for discussion.

I have the honor of associating myself with my honorable colleague, his Excellency the first delegate from Persia, in proposing the suppression of this article.

In the first place, we do not believe it admissible to stipulate in a world convention, and more particularly in a convention of this nature, that a whole category of cases, of differences, of disputes, should be taken out of the range of arbitration; to be sure, of obligatory arbitration in the first place, but possibly, in the thought of some, of arbitration in general, solely for the reason that with it is connected a question of extraterritorial right.

It is evident that if the stipulations to which we are opposed were to be

maintained, the application of arbitration would stop precisely at the line of the most of the cases that interest you in the highest degree and with regard to which the exception proposed in Article 16 *l*—apart from the ill impression which it might create—does not seem to us justified in any way.

In our judgment, the omission of this article is, let me state it again, necessary, and in the name of the delegation I declare that if the article is maintained, the delegation cannot vote in favor of the project except under the reservations that I have just stated to the Commission.

His Excellency Mr. **Lou Tseng-tsiang**: In the preceding meeting, the Chinese delegation already protested against this clause which is, I will not say ill-intentioned, but awkward in a world convention. I sincerely regret the presence of this article in this project, and all the more because it compels us to change our attitude with regard to a cause for which we have not ceased to show our sympathy.

As Article 16 *l* refers to a certain number of Powers, and since the representatives of these Powers have all protested, I come, therefore, in the name of my colleagues and in the name of the Government which I have the honor to represent here, to ask of the Commission to perform before this altar of the God of [117] Right and of Justice, so eloquently exalted by our very honorable colleague, his Excellency Mr. MARTENS, an act of international equity and justice, by eliminating this article which, according to our point of view, contains a striking inequality. I also address myself to the spirit of conciliation and understanding of the honorable authors of the proposition, and especially to the sentiments of equity and justice which animate, I feel convinced of it, the honorable Dean of the jurists here present, to ask of them to perform an act of renunciation which will be an act of justice and for which public opinion will be grateful to them.

In consequence, I propose to the Commission the suppression, pure and simple, of Article 16 *l* which, in our judgment, does not present a general interest for all the States here represented, and which would be out of place in the Convention that we are now discussing and that we desire to make a world convention.

Mr. **James Brown Scott** supports the proposition of the first delegates from Persia and China calling for the suppression of Article 16 *l*.

His Excellency Sir **Edward Fry**: The British delegation cannot accept the proposition tending to the suppression of Article 16 *l*, and it regrets that this article has given rise to objections on the part of certain delegations, objections which the situation does not, in our judgment, in any way justify. For what is this situation?

We are at present discussing an obligatory arbitration project which bears upon only certain subjects, and from which has been carefully excluded any matter which, because of its importance, might, if it were submitted to the principle of obligatory arbitration, involve interests which it is at the present time desirable to leave undiscussed.

Now, in our judgment it is incontestable that the rights resulting from extra-territoriality occupy a very special place in the field of international law, and it would be illogical to have these rights tacitly entered into the list of matters subject to obligatory arbitration when from this list there have been excluded subjects which in importance are inferior to them.

For it is proper to observe that the class of rights included under the name "extraterritorial rights" does not merely include the right of jurisdiction exercised in certain countries. And thereto must be added the rights enjoyed by diplomatic and consular representatives and war vessels in foreign ports. In this respect all the nations of the world have contracted mutual engagements, and in a large measure the friendly relations between them are based upon the maintenance, without discussion, of these engagements.

Moreover, the right itself of consular jurisdiction, is exercised by a very large number of nations, and, in so far as we are concerned, the maintenance of this right is of the highest importance and we can never consent to its being jeopardized, even indirectly. We believe, therefore, that it is indispensable to maintain the *status quo*.

In addition to all this, there is this that is peculiar to extraterritorial rights: they form a part of the sovereign rights of the States possessing them; and they might be involved in any differences submitted to obligatory arbitration. This is why it seems to us essential to make an express mention of the fact of their exclusion, since, without this, they might be involved in the litigations concerning the matters mentioned in the list, however restricted the latter might be.

His Excellency Mr. **Martens** expresses himself in favor of the suppression of Article 16 *l* because it seems to him that it is useless.

The list which has been adopted does not include any case affecting extraterritorial rights; it is, therefore, not necessary to mention them within the scope of this article.

[118] His Excellency Baron **Marschall von Bieberstein:** I shall vote against Article 16 *l*. If it is desired to establish world obligatory arbitration, it is inadmissible to exclude the capitulary right which is one of the most contested of the existing juridical matters. The provision of the article would create an inequality between the signatory States; any State might invoke arbitration against the States subject to the capitulary right, but would be entitled to refuse it to them in questions of the highest interest to them.

His Excellency **Turkhan Pasha** concurs in the remarks of the first delegate from Germany and adds that in view of the fact that it had from the beginning declared that it could not accept the project presented by the committee, the Imperial Ottoman delegation will also vote against this article which is in all regards inacceptable.

His Excellency Mr. **Carlin** declares that in as much as Article 16 *l* has in view an article which he disapproved of, he will abstain from taking part in the voting.

His Excellency Mr. **Keiroku Tsudzuki** declares that his abstention in this question should not be interpretated as against the wishes expressed by some Powers.

The **President** states why he shall vote for the article without failing to uphold the principle of the equality of the States and the equal right of all peoples to have recourse to arbitration. The article excludes no State, but is directed to certain classes of cases. In the first lists that were presented to the committee, mention was made of diplomatic and consular privileges and of the right of foreigners to acquire and to own property. These cases brought up the general problem of extraterritoriality which exists among all the peoples of the earth. But, these cases having disappeared from the definitive list, he admits

that the article is almost useless. Extraterritorial rights are in fact excluded from obligatory arbitration in case not one of the cases admitted without reservation explicitly refers to it. But in view of the fact that in presenting this article, the thought of the committee was never colored by the slightest intention contrary to the principle of the equality of the States, it will be solely for the purpose of affirming the nature of this intention that I shall vote in its favor.

The suppression of Article 16 *l* when put to a vote is decided by thirty-six votes against two (France and Great Britain), and five abstentions (Greece, Japan, Portugal, Sweden and Switzerland).

His Excellency Sir **Edward Fry** declares that inasmuch as Article 16 *l* had been defeated, the British delegation must reserve to its Government the right to release itself from the obligation to have recourse to arbitration in all cases concerning the interpretation or the application of extraterritorial rights.

His Excellency Mr. **Lou Tseng-tsiang** states that in the presence of the result of the vote, which entirely satisfies him, he casts a favorable vote for the entire project.

In consequence, the votes of the Chinese delegation will be corrected in the minutes, in conformity with this declaration.

Article 16 *m* is then taken up.

ARTICLE 16 *m*

The present Convention shall be ratified with the least possible delay.

The ratifications shall be deposited at The Hague.

[119] The ratification of each signatory Power shall specify the cases enumerated in Article 16 *d* in which the ratifying Power shall not take advantage of the provisions of Article 16 *a*.

A *procès-verbal* shall be drawn up for each ratification, a certified copy of which shall be transmitted through the diplomatic channel to all the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications including additional cases contained in Article 16 *d*.

The **President**: This article refers to the ratifications of the Convention. Baron GUILLAUME had not settled the question as to whether or not the text would form a part of the Convention for the pacific settlement of international disputes or should form the object of a special convention. I must consult the Commission upon this matter.

His Excellency Mr. **Nelidow**, the President of the Conference, believes that the articles of the Anglo-American project cannot in his judgment, in any case form an integral part of the old Convention of 1899. For, not having obtained approval of all the delegations, these articles could not be inserted into a convention adopted unanimously.

This would put into peril the very existence of the entire Convention.

His Excellency Mr. **Hagerup** observes that the provision of paragraph 3 of this article seems rather directed to Article 16 *e*, and that it ill agrees with the contents of Article 16 *d* which presumes an obligation for the signatory Powers in all the cases therein enumerated.

The **President** in replying to Mr. HAGERUP, believes indeed that these provisions could not be explained until the conditions of the protocol had been determined. Their phraseology will be postponed until that time. But he could

not but bring up, *à propos* of this article, the question of principle concerning the special Convention. He believes that the article relates more to Article 16 *e* than to Article 16 *d*. As for the matter of the Convention, the PRESIDENT observes that the Commission is now deliberating and that in such case it is customary to incorporate the texts receiving a large majority, in the hope of reaching a quasi-unanimity.

His Excellency Mr. **Nelidow** replies by stating that he has prejudged nothing and that he has but expressed his opinion.

His Excellency Count **Tornielli**: The Italian delegation believes that it is preferable not to insert into the Convention of 1899 Articles 16 *a* and following, of the Anglo-American project, the discussion of which has just been brought to a close. This project has already received the structure of a separate act, and the provisions which it contains concerning a special matter: the application of the principle of obligatory arbitration to certain classes of international disputes. If we were to introduce into the General Convention these provisions which gave rise to a debate so recently that it would serve no good end to refer now to its character and its importance, we would risk the danger of making it necessary for certain Powers not to sign the newly revised convention. It is thoroughly understood that for these Powers the Convention worked out by the First Conference remains in force no matter what may happen. But in the work of revision accomplished this year, a large number of modifications and of additions have been introduced into the first and into the last parts of the Convention. These are real improvements that we have been charged with introducing into the Convention relative to the pacific settlement of international disputes, and it would not be well that all the States present at this Conference should not profit by this very useful work.

[120] His Excellency Mr. **Beldiman** calls the attention of the Commission to the consequences of this incorporation: The States that might vote against the provisions of the Anglo-American project might no longer, except under difficulties, remain signatories of the Convention.

His Excellency Mr. **Choate** concurs in the opinion expressed by the President of the Conference and calls for a separate Convention.

His Excellency Mr. **Mérey von Kapos-Mére**: I take the liberty of supporting the remarks made but a little while ago by his Excellency the President of the Conference. If Mr. BOURGEOIS thinks that this matter might not thus be prejudged, I believe, on the contrary, that it should even be decided by our President and that it cannot form the object of a vote of the Commission.

According to my judgment, it would be absolutely inadmissible to insert these articles into the Convention of 1899. Three reasons stand in the way of such proceeding:

1. The articles which we have just been discussing do not contain matters of detail nor simple improvements, such as we have introduced, but rather a new element of much greater and graver importance, which does not enter into the scope of the Convention of 1899.

2. Obligatory arbitration does not figure in the program of our Conference, which mentions only improvements to be made in the Convention of 1899. The, as I stated a little while ago, introduction of obligatory arbitration is more than a simple improvement. Obligatory arbitration should, therefore, remain separate.

3. Finally, to resume a thought which has already been formulated by his Excellency Mr. BELDIMAN, what would be the position of Powers which have signed and ratified the Convention of 1899, but do not accept the new provisions? Such Powers would be forced to suffer the consequences: denounce the Convention, recall their members of the Permanent Court, etc. I do not believe that the advocates of the proposition of the committee of examination would like to bring about this regrettable result.

His Excellency Baron **Marschall von Bieberstein** concurs in the words of his Excellency Mr. MÉREY VON KAPOS-MÉRE.

The **President** declares that no one thinks of compelling the signatories of the Convention of 1899 to withdraw from the Convention of 1907. He has merely stated that one must always hope for a quasi-unanimity and a final agreement, and that it was better not prematurely to prejudge that this object would not be attained. This being so, and if no one calls for the incorporation, there can be no difficulty.

His Excellency Mr. **Martens** believes that, even for the States that are in favor of obligatory arbitration, it is impossible to assent even now to the incorporation of the Anglo-American project in the Convention of 1899. We must wait until the close of the discussions. He reminds the members that Russia voted for but few cases of the list on condition that a quasi-unanimity might be secured.

The **President** states that no one insists upon the incorporation of the Anglo-American project into the Convention of 1899 and that, in consequence, Articles 16 *m* and 16 *n* retain their usefulness.[1]

No other objection having been made, these articles are declared adopted.

[121] The PRESIDENT puts the Anglo-American project to a vote.

Voting for, 32: United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Siam, Sweden, Uruguay, Venezuela.

Voting against, 9: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Montenegro, Roumania, Switzerland, Turkey.

Abstaining, 3: Italy, Japan, Luxemburg.[2]

The Commission then passes to the examination of Articles 39 and following of the new Convention.[3]

ARTICLE 39

The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

His Excellency Mr. **Domingo Gana:** The delegation of Chile desires to make the following declaration in the name of its Government with respect to this article. Our delegation at the time of signing the Convention of 1899 for the pacific settlement of international disputes did so with the reservation that

[1] Annex 72.
[2] See the text of the project adopted by the Commission, vol. i, p. 537 [537].
[3] Annex 70.

the adhesion of its Government as regards Article 17 would not include controversies or questions prior to the celebration of the Convention.

The delegation of Chile believes it to be its duty to-day to renew, with respect to the same provision, the reservation that it has previously made, although it may not be strictly necessary in view of the similar character of the provision.

Articles 40 to 47 are adopted without discussion.

ARTICLE 40

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the signatory Powers, these Powers reserve to themselves the right of concluding either before the ratification of the present act or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

CHAPTER II.—THE PERMANENT COURT OF ARBITRATION

ARTICLE 41

With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory
[122] Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 42

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 43

The Permanent Court has its seat at The Hague.

An International Bureau serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court. It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the Bureau, as soon as possible, a duly certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

ARTICLE 44

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members. The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed, and for a fresh period of six years.

ARTICLE 45

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, of whom one only can be its *ressortissant* or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

[123] If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court exclusive of the members selected by the litigant parties and not *ressortissants* of either of them. Which of the candidates thus presented shall be umpire is determined by lot.

ARTICLE 46

The tribunal being composed as has been stated in the preceding article, the parties notify to the Bureau as soon as possible their determination to have recourse to the Court, the text of the *compromis,* and the names of the arbitrators.

The Bureau likewise communicates without delay to each arbitrator the *compromis,* and the names of the other members of the tribunal.

The tribunal assembles on the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the tribunal, in the performance of their duties, and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 47

The International Bureau is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

ARTICLE 48

The signatory Powers consider it their duty if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

In case of dispute between two Powers, one of them may always address to the International Bureau at The Hague a note containing a declaration that it would be ready to submit the dispute to arbitration.

The International Bureau must at once inform the other Power of the declaration.

His Excellency Mr. **Keiroku Tsudzuki** declares that the Japanese delegation is of the opinion that intervention of a third party in a dispute between two States is in no way of a nature to allay the tension in their relations.

He makes reservations with regard to the last two paragraphs of Article 48.

His Excellency Mr. **Augusto Matte**: The committee of examination A, presided over by your Excellency, has, in the meeting of last Tuesday, considered the proposition presented by the delegation from Peru and the amendment
[124] suggested by the delegation from Chile, and whose object it would be to add a new article to that which figures under Number 27 of the Convention of 1899 for the pacific settlement of international disputes.

The Peruvian proposition tended to establish that in case of conflict between two Powers, either one of them could address itself to the Hague International Bureau and inform it that it is disposed to accept arbitration, at the same time informing it of the considerations upon which it bases that which it holds to be its rights. According to this same proposition, the International Bureau was to make this communication known to the other Power and to offer its good offices to both, with a view of an exchange of ideas which might incline them to conclude a *compromis* with one another.

To this proposition, the delegation from Chile suggested the following amendments:

The first tending to establish expressly that the Peruvian proposition could be applied only to differences that might arise subsequently to the Convention under discussion, and in no way to facts connected with differences that had arisen previously thereto.

The object of the second amendment was to preserve for the International Bureau the purely administrative rôle conferred upon it by the Convention of 1899, without that political character with which the Peruvian proposition meant to clothe it.

According to the minutes of the meetings of August 13, last, the Commission approved the Peruvian proposition as modified by the Chilean amendment.

In its meeting of day before yesterday, the committee of examination A adopted a compromise phraseology of the article in question with the result that it has taken into consideration that part of our amendment relative to the purely administrative functions of the International Bureau, but that it has not believed it necessary to adopt the other part relative to the non-retroactive effect of the proposition.

We have thought it necessary to inform ourselves with regard to the reasons for this decision, and several members of the committee who had taken part in the discussion informed us that the committee thought that in view of the fact that no convention could have any retroactive effect, save one in which it is stipulated to the contrary, it had seemed useless to include an incontestable affirmation in Article 27 *bis*.

Under these conditions, and if it is understood that the text adopted by the committee must be interpreted in this sense, the delegation from Chile declares itself fully satisfied and considers the two principles which formed the basis of its amendment faithfully realized.

His Excellency Mr. **Turkhan Pasha** makes reservations with regard to this article.

His Excellency Mr. **Carlos G. Candamo**: The Peruvian delegation must make certain corrections in the minutes of the meeting of committee A, of October 1, 1907.

Immediately after I had finished speaking in support of the proposition of

the Peruvian delegation and had emphasized its entire voluntary character, strictly optional, the discussion proceeded with the second part of the proposition, that part which relates to the functions attributed to the International Bureau. After having heard several of its members, and, in agreement with me, the committee decided to omit some portions of this second part. Afterwards, upon the suggestion of his Excellency Mr. MILOVANOVITCH concerning the first part of the Peruvian proposition, the PRESIDENT wondered if anyone of the committee had remarks to make concerning this first part. No one having offered remarks, the PRESIDENT declared the first part approved, and put to a vote the entire Peruvian proposition with the omission made by the committee in the second part. It was approved by a large majority.

The **President:** There can be no doubt in this matter; as for the non-retroactivity, it cannot be questioned and our colleagues from Chile are entirely satisfied as to this matter.

[125] Mr. **James Brown Scott** states that the delegation from the United States of America renews the reservation which it made on July 25, 1899, with regard to Article 27 (at present Article 48) and reading as follows:

> The delegation of the United States of America on signing the Convention for the pacific settlement of international disputes, as proposed by the International Peace Conference, makes the following declaration:
>
> Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

Mr. **Georgios Streit** declares that the Hellenic delegation has not as yet received any instructions with regard to this article and that it abstains from voting upon it.

His Excellency Mr. **Mérey von Kapos-Mére:** I desire merely to state that the Austro-Hungarian delegation concurs entirely in the reservations made by his Excellency the first delegate from Japan concerning the Peruvian amendment. We have, moreover, in the committee of examination, voted against this amendment.

In 1899 the Austro-Hungarian delegation, unconvinced, accepted Article 27. It has never indulged in the optimism of some other delegations with regard to this article. I find that in the eight years that have elapsed since the conclusion of the Convention of 1899 this article has never been applied. We know, all of us, that opportunities for its application have not been wanting. There have been litigations, differences and even great wars between the States, and never, not even a single time, has this article been put into practice. The reason for this is very simple: each Power bethought itself before putting its finger between the anvil and the hammer. Now, if I derive comfort from the existence of this article in the fact that it has not been applied, I should nevertheless think it most inopportune to develop it by adding the Peruvian amendment to it. Furthermore, the latter seems to me rather grave and dangerous, for it would create for either

the one or the other of the two Powers in controversy the temptation to grant to the other recourse to arbitration.

When two Powers are in disagreement, which is the most natural, the most simple means to come to arbitration if it is not by way of diplomacy? The diplomatic agent will betake himself to the minister of foreign affairs of the country to which he is accredited and will propose arbitration to him. This will be an entirely friendly and very discreet act, for it will be effected in the private office of the minister. The situation would be an entirely different one, if, instead of availing itself of this natural and normal way, one of the Powers were to choose a means so far-fetched as the agency of the International Hague Bureau. In my opinion, this would be putting the pistol to the breast of the other, it would be exercising a pressure. I believe that such a manner of proceeding would not aid in improving the relations between the States, nor render recourse to arbitration more sympathetic and more frequent. This is the reason why the Austro-Hungarian delegation will vote against the Peruvian amendment.

Baron **d'Estournelles de Constant**: Permit me, my dear colleague, to respond with a few words in the name of those who proposed Article 27, the present Article 48, eight years ago. I am one of those who advocate it
[126] in its new form, but without deluding myself in the way suggested by Mr. MÉREY. I never expected a miracle of it, above all in so short a time. What my colleagues of Peru and Chile have desired is that our labors shall not result solely in a convention on paper, but that this convention shall become a reality. After having made it a *duty* to remind States in dispute that the court at The Hague is open to them, it is desired to give to the latter a practical means of having recourse to it. Mr. MÉREY has very justly remarked that up to the present "not a single Power has ventured between the anvil and hammer." Precisely, we wished to do away with the anvil and hammer!

It was not only necessary to establish a theoretical duty. It was also necessary to give to the States an automatic facility to conform thereto.

Mr. MÉREY gives preference to diplomats to offer and negotiate an arbitration.

That is where the danger lies.

In many cases this manner of proceeding will be possible. But, at times there are, at the moment of disputes, periods of tension that make it almost impossible for a diplomatist to go and see the minister of foreign affairs and frankly to say to him: Let us make an end of this; let us have recourse to arbitration.

If you desire to make access to the arbitration court possible, let the latter at least be opened.

Instead of obliging the parties in dispute to extend each other their hands, which is very difficult, we say to them: Simply address yourself to the neutral Bureau at The Hague which is, by its nature, an intermediary.

The rôle of the Bureau will in no way be political. It will be a rôle of transmission, the rôle of an international letter box. It is in this sense that no one of us—if he *really* desires the progress of arbitration—can refuse to vote for the proposition of Peru. (*Applause.*)

His Excellency Mr. **Martens** reminds the members of the fact that upon his initiative it was agreed that in making the communication referred to in Article 48 the Bureau will not perform any diplomatic function.

The President puts the last two paragraphs of this article to a vote.

Article 48 is adopted by 34 votes against 7, with 3 abstaining.

Voting for, 34: United States of America, Argentine Republic, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Mexico, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Siam, Switzerland, Uruguay, Venezuela.

Voting against, 7: Germany, Austria-Hungary, Belgium, Japan, Roumania, Sweden, Turkey.

Abstaining, 3: Greece, Luxemburg, Montenegro.

Articles 49 and 50 are adopted.

ARTICLE 49

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for
[127] Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It shall present to them an annual report on the labors of the Court, the working of the administration, and the expenditure. The report shall contain a *résumé* of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 44, paragraphs 5 and 6.

ARTICLE 50

The expenses of the Bureau shall be borne by the signatory and adhering Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date of their adhesion.

CHAPTER III.—ARBITRATION PROCEDURE

ARTICLE 51

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules, which shall be applicable to arbitration procedure, unless other rules have been agreed on by the parties.

(*No remarks.*)

ARTICLE 52

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are defined the subject of the dispute, the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 64 of the

present Convention must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The *compromis* shall likewise define, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

(*No remarks.*)

[128] ARTICLE 53

The Permanent Court is competent to settle the *compromis,* if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

His Excellency Mr. **Carlin**: The Swiss delegation cannot accept No. 2 of Article 53, and this for reasons similar to those not permitting her to adhere to the proposition of the United State of America concerning the recovery of contract debts.

In its vote upon the said article, the Swiss delegation excludes, therefore, expressly No. 2, and it has the honor to request the Commission to be good enough to have record entered of this reservation.

Mr. **Georgios Streit**: The Hellenic delegation finds itself compelled to make reservations with regard to paragraph 2, Nos. 1 and 2 of Article 53, and also with regard to the provisions of Articles 54 and 58, in so far as they relate to the said paragraph 2 of Article 53.

In its judgment the provisions of paragraph 2 of Article 53, establishing the competence of the Permanent Court to draft the *compromis,* even in case the request therefor should be presented by one of the parties, do not square with the other rules contained in Chapter III, and which, in virtue of the purely optional character of Article 52, presuppose the willingness of the two parties to have recourse to arbitration. Only paragraph 1 of Article 53 seems to conform to the spirit by which Chapter III was inspired.

Paragraph 2 of Article 53 would rather adapt itself to the regulation of the competence of an arbitral court, constituted in advance and established on a permanent basis; for one may well wonder what will be the operation foreseen by this clause, in view of the fact that according to the procedure of the Convention of 1899 it is the parties that, from the list of the court constituted by the contracting Powers, choose the arbitrators to whom they submit their differences. It may furthermore be asked if the provision just referred to is not rather of

such a nature as to place obstacles in the way of obligatory arbitration, in view of the possibility that certain Powers which would be willing to have recourse to arbitration on the basis of a *compromis* freely assented to, might refuse to avail themselves of such recourse, conformably to the right given them by Article 53, paragraph 2, in order to avoid a *compromis* which might be forced upon them against their desires.

To these considerations it may be objected that the provisions of the obligatory *compromis* as established by Article 53 will be applicable only in so far as the competence of the court might not be excluded in future treaties. This objection can be raised only with regard to No. 1 of paragraph 2 of this
[129] Article; for No. 2 seems to have a more general bearing. But even as concerns No. 1, new difficulties seem to arise in consequence of the use, in a two-fold meaning, of the word "competence." It is possible that two Powers may desire not to exclude the "competence" of the court, in the sense of paragraph 1 of Article 53, that is to say, for those cases in which the parties might agree to resort to the court, but that these same Powers may desire to exclude the competence of the court in the sense of paragraph 2, to wit, as concerns the obligatory *compromis;* doubts may arise as to which of the two alternatives is desired, when a general arbitration treaty excludes the "competence" of the court from establishing the *compromis.* These doubts might also result in delaying, if not in preventing recourse to arbitration. For these reasons, and without desiring to make a proposition that might make it necessary to take a special vote upon paragraph 2 of Article 53, the Hellenic delegation merely desires that record shall be made of its reservation.

His Excellency Mr. **Turkhan Pasha** makes reservations with regard to the second paragraph.

His Excellency Mr. **Ruy Barbosa** concurs in the remarks of the delegate from Greece.

His Excellency Mr. **Keiroku Tsudzuki** not having taken part in the vote upon the project of obligatory arbitration, makes reservations with regard to the second paragraph of Article 53 and also with regard to Article 54.

Article 53 is adopted subject to these reservations.

Articles 54 to 64 are adopted without discussion.

ARTICLE 54

In the cases contemplated in the preceding article, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 45, paragraphs 3 to 6.

The fifth member is *ex officio* president of the commission.

ARTICLE 55

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Act.

Failing the composition of the tribunal by agreement of the parties, the course referred to in Article 45, paragraphs 3 to 6, is pursued.

ARTICLE 56

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 57

The umpire is *ex officio* president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 58

When the *compromis* is settled by a commission, as contemplated in Article 55, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

ARTICLE 59

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

[130] ARTICLE 60

The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting once fixed cannot be altered by the tribunal, without the assent of the parties.

ARTICLE 61

If the question as to what languages are to be used has not been settled by the *compromis,* it shall be decided by the tribunal.

ARTICLE 62

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 63

As a general rule, arbitration procedure comprises two distinct phases: written pleadings and oral discussions.

The written pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the *compromis.*

The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

ARTICLE 64

Every document produced by one party must be communicated to the other party in the form of a duly certified copy.

ARTICLE 65

Unless special circumstances arise, the tribunal shall not meet until the pleadings are closed.

His Excellency Mr. **Keiroku Tsudzuki** makes reservations with regard to this article.

Articles 66 to 75 are adopted without discussion.

ARTICLE 66

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

[131] They are recorded in minutes drawn up by the secretaries appointed by the president.

These minutes are signed by the president and by one of the secretaries and alone have an authentic character.

ARTICLE 67

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 68

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers and documents, but is obliged to make them known to the opposite party.

ARTICLE 69

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

ARTICLE 70

The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 71

They are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

ARTICLE 72

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ARTICLE 73

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of law.

ARTICLE 74

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its final arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 75

The litigant Powers undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute.

[132]

ARTICLE 76

For all notifications which the tribunal has to make in the territory of a third Power, signatory of the present Convention, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests can not be rejected unless the requested Power considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

His Excellency Mr. **Carlin** calls the attention of the members to the decision taken by the Commission on the occasion of the reading of Article 24. The committee on the drafting of the Final Act must exercise care and take into account this decision by harmonizing the text of Articles 76, paragraph 2, and 24, paragraph 2, with that of Article 23, paragraph 2.

ARTICLE 77

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president declares the discussion closed.

(*No remarks.*)

ARTICLE 78

The deliberations of the tribunal take place in private and remain secret.

All questions are decided by a majority of members of the tribunal.

His Excellency Mr. **Keiroku Tsudzuki** makes reservations with regard to this article. He would have preferred to have retained the last paragraph of the former Article 51 and of the second paragraph of Article 52, which entitled the minority to have its opinion recorded.

Articles 79 to 82 are adopted.

ARTICLE 79

The award, given by a majority of votes, must state the reasons on which it is based. It contains the names of the arbitrators; it is signed by the president and by the registrar or by the secretary acting as registrar.

ARTICLE 80

The award is read out at a public sitting of the tribunal, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE 81

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitively and without appeal.

ARTICLE 82

Any dispute arising between the parties as to the interpretation and execution of the award shall, provided the *compromis* does not exclude it, be submitted to the decision of the tribunal which pronounced it.

[133]

ARTICLE 83

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

His Excellency Mr. **Martens** reiterates his reservations with regard to this article.

Articles 84 to 94 are adopted.

ARTICLE 84

The award is binding only on the parties in dispute.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 85

Each party pays its own expenses and an equal share of the expenses of the tribunal.

CHAPTER IV.—ARBITRATION BY SUMMARY PROCEDURE

ARTICLE 86

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules, which shall be observed in the absence of special arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 87

Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Court (Article 44), exclusive of the members appointed by either of the parties and not being *ressortissants* of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decision by a majority of votes.

ARTICLE 88

In the absence of any previous agreement, the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

[134]

ARTICLE 89

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government which appointed him.

ARTICLE 90

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts be called. The tribunal has, on its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in court it may consider useful.

GENERAL PROVISIONS

ARTICLE 91

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers that were represented at the International Peace Conference at The Hague.

ARTICLE 92

Non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known their adhesion to the contracting Powers by a written notification addressed to the Netherland Government, and communicated by it to all the other contracting Powers.

ARTICLE 93

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 94

In the event of one of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals thereto.

Done at The Hague, . . . in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

His Excellency Mr. **Turkhan Pasha**: In the name of its Government, the Ottoman delegation declares that it is not unaware of the happy influence that good offices, mediation, commissions of inquiry and arbitration may exercise upon the maintenance of friendly relations between the States; nevertheless, in [135] giving its adhesion to the whole project, it desires to state that it believes these means must remain of a purely optional nature; in no case could it regard them as of an obligatory character such as might render them susceptible of leading, directly or indirectly, to an intervention.

The Imperial Government desires to remain its own judge of those cases in which it may be regarded as necessary to have recourse to these various proceedings, or to accept them in such a way that its decision upon this point may not be viewed by the signatory States as an unfriendly act.

It is evident that the means in question may never be applied to matters of a domestic nature.

Special record is made of the declaration of his Excellency Mr. TURKHAN PASHA.

The whole of the revised Convention of 1899 is unanimously adopted.[1] (*Prolonged applause.*)

The meeting closes at 6: 15 o'clock.

[1] See vol. i, p. 440 [442 and 443].

[136]

EIGHTH MEETING

OCTOBER 9, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4 o'clock.

The minutes of the third, fourth, fifth, sixth and seventh meetings are approved.

The minutes of the seventeenth meeting of the committee of examination are approved.

The **President** communicates to the Secretariat a letter from the first delegate of Nicaragua who adds his affirmative vote to all the votes of the preceding meetings regarding the obligatory arbitration project.

The PRESIDENT reads aloud the articles of the English protocol,[1] referred to in Article 16 *e* of the Anglo-American project[2] and states that the four points of which it is composed but explain the mechanism indicated in this article.

1

Each Power signatory to the present protocol accepts arbitration without reserve in such of the cases listed in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it makes this engagement with each of the other signatory Powers whose reciprocity in this respect is indicated in the same manner in the table.

2

Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table with respect to which it may not already have accepted arbitration without reserve. For this purpose it shall address itself to the Netherland Government, which shall have this acceptance indicated on the table and shall immediately forward true copies of the table as thus completed to all the signatory Powers.

3

Moreover, two or more signatory Powers, acting in concert, may address themselves
[137] to the Netherland Government and request it to insert in the table additional subjects with respect to which they are ready to accept arbitration without reserve.

These additional matters shall be entered upon the table, and a certified copy of the text as thus corrected shall be communicated at once to all the signatory Powers.

4

Non-signatory Powers are permitted to adhere to the present protocol by notifying the Netherland Government of the matters in the table with respect to which they are ready to accept arbitration without reserve.

[1] Annex 40.
[2] Annex 72.

The articles of the protocol are adopted without remarks, also the plan of the table presented by Mr. CROWE.[1]

His Excellency Mr. **Martens** requests the privilege of the floor and expresses himself in these terms:

In the name of the Russian delegation I have the honor of presenting a conciliatory proposition. The sole object of this proposition is to establish the status at the present time, after four months of deliberations, of the question of obligatory arbitration. At the close of the last meeting, many of us said to ourselves, on leaving the Ridderzaal, that it was to be regretted that a disagreement had arisen with regard to a question in which neither the independence, nor the honor, nor the essential interests of the nations were involved. And this, in the presence of the fact that, in the much-controverted field of international maritime law, a basis for an understanding had been reached. I thought it, therefore, desirable to endeavor to find also an intermediate solution of the question of obligatory arbitration.

I do not ask for any *concession,* either from the majority or from the minority, but I would ask both the majority and the minority to realize a simple *fact.* I should be happy if I had found that basis of understanding without imposing upon anyone whatever the sacrifice of his opinions.

We have voted the improved convention for the pacific settlement of international disputes. We have voted it unanimously. It will constitute the General Arbitration Act. Beside this Convention there is the Anglo-American project voted only by a majority of votes.

Well now; let us confess in the first place that the articles of this project cannot be included in the Convention, for the reason that it has not obtained a majority. And on the other hand, let us also recognize the right of the Powers forming a majority to sign between themselves a special treaty apart from this general convention. In this way one would introduce into the text of the Convention of 1899, instead of the Anglo-American project, one sole article, recording, on the one hand the efforts of the Powers to reach a general agreement and the ill success of these efforts, and on the other hand, the right of the majority to conclude a separate act.[2]

ARTICLE 17

On account of the great difficulty in determining the extent to which and the conditions under which recourse to obligatory arbitration might be recognized by the unanimous vote of the Powers in a general treaty, the contracting Powers confine themselves to enumerating in an additional act, annexed to the present Convention, such cases as deserve to be taken into consideration in the free opinion of the respective Governments. This additional act shall be binding only upon such Powers as sign it or adhere to it.

(Here follow the articles of the old Convention of 1899, with the modifications adopted by the First Commission.)

[138] This article, as may be seen, is composed of two parts. One takes into account the situation created as a result of a want of unanimity. The other states the fact that there are Powers that are agreed upon the question of obligatory arbitration. The preamble of the additional act would state:

[1] Annexed to this Minute; see vol. i, pp. 539 and 540 [541 and 542].
[2] Annex 46.

ADDITIONAL ACT TO THE CONVENTION

Considering that Article 16 (38) of the Convention of 1899 for the pacific settlement of international disputes sets forth the agreement of the signatory Powers to the effect that in legal questions, and especially in the interpretation and application of international conventions, arbitration is recognized as the most effective and at the same time most equitable means of settling disputes which diplomacy has failed to settle;

Considering that arbitration should be made obligatory in differences of a legal nature which, in the free opinion of the contracting Powers, do not involve their vital interests, their independence or their honor;

Considering the usefulness of indicating in advance the kinds of disputes in which the above-mentioned reservations are not admissible;

The Powers signing this additional act have agreed upon the following provisions: . . .

Once more I emphasize the conciliatory nature of the Russian proposition which does not attempt to modify the positions of the two parties, but to state them with greater precision. I believe that in adopting it, we will have found the means to draw near unto the sublime goal toward which all our efforts have been directed, and that we will have deserved the thanks of mankind and of our Governments. (*Applause.*)

His Excellency Mr. **Mérey von Kapos-Mére:** Let me begin by stating that I am entirely in accord with his Excellency Mr. MARTENS upon a point on which he has greatly relied: the desire to reach an understanding as complete as possible, a unanimous agreement. Nevertheless, and to my great regret, it is the only point upon which I agree with Mr. MARTENS. Permit me to make two statements of fact. The first is to the effect that the program of the day of this meeting brings up only three matters: approval of the minutes of a previous meeting, continuation of the reading of the report of Baron GUILLAUME and discussion of the report of Mr. SCOTT. This program says nothing of a new proposition which is not included in the report of Baron GUILLAUME and which would be officially brought before us this day. In the second place, according to Article 9 of the Regulations for the Conference,[1] any new proposition before being brought to discussion must be printed and distributed among the members of the Conference. This has not been the case with regard to the proposition which Mr. MARTENS has just laid before us. I have heard members speak of this proposition, but as yet I do not know of its details. In consequence, neither myself, nor in all probability the most of our colleagues would be in position to discuss it immediately, and although I could even now raise serious and grave objections against it, I withstand the temptation to do so and will not enter into a discussion of the principle of this proposition. It is necessary, in my opinion, that it should in the first place be printed and distributed and that we should be given time to study it and ask our governments for instructions in regard to it.

His Excellency Baron **Marschall von Bieberstein** approves of the remarks of Mr. MÉREY; he believes that it is at the present time impossible to discuss the proposition of Mr. MARTENS.

[139] The **President** is not opposed to a postponement of the discussion; he believes that it is necessary to admit any suggestions that may lead to a friendly solution of the difficulty which is dividing the Commission.

[1] Vol. i, p. 52 [55].

His Excellency Baron **Marschall von Bieberstein**: Provided that the proposition presented is acceptable, a fact which does not seem to me to be the case with regard to the one presented by Mr. MARTENS.

The **President** requests the Commission not to postpone the discussion of the new proposition beyond to-morrow. (*Approval.*)

The Commission then passes on to the examination of the proposition of his Excellency General PORTER relative to the pacific recovery of contract debts.[1]

Mr. **José Gil Fortoul** takes the floor and speaks as follows: I will not indulge in a long discourse. I merely desire to explain in a few words the vote of the Venezuelan delegation upon the Porter proposition.

It has been insinuated, not without some irony, that this matter of contract debts was more of interest to America than to the whole world. I will do no more than observe that such an insinuation is founded neither in theory nor in fact. In the first place, the discussions of the Conference are of a universal nature derived both from its formation and the purpose of all of us to deal only with questions relating to the community of States. In the next place, it cannot be said that only certain Powers of the American continent are exposed to disputes arising from contract debts. The history of the past century would supply us with numerous illustrations of such conflicts that have arisen from like causes in other continents.

I shall not refer to debts arising from State loans, in view of the fact that the doctrine upon this matter has been eloquently, and I believe, finally developed, on several occasions, by my eminent colleague and friend, Mr. DRAGO. Moreover, according to the report which we have before us,[2] his Excellency General PORTER has declared in the committee of examination that the distinction between debts arising from contracts between one State and another State, and those arising between one State and the nationals of another State, is here of little importance, because the former are at all events safeguarded by the general principles of the law of nations. In consequence, the Porter proposition seems to address itself especially to the second class of debts. And it is, gentlemen, with regard to this aspect of the question, that I must make an essential reservation.

The proposition which we are discussing begins, in its first paragraph, by doing away with all recourse to armed forces for the recovery of contract debts; but in the second paragraph this recourse, scarcely disguised, reappears under the threatening motto of the word "*however.*" And in this word one immediately discovers contradiction, or at least one of those subtilities, dear to old-fashioned diplomacy, by which an attempt is made to withdraw with one hand that which has been offered with the other. As for myself, gentlemen, I hasten to remark that I give no credence to this supposition. I believe, on the contrary, that if paragraph 2 lends itself to different interpretations, and that if it cannot be accepted by all the States here represented, it will be due to its phraseology, into which have slipped certain phrases, apparently inoffensive, but which enclose, nevertheless, as I see things, both a false theory and a threat against the States which do not as yet have at their disposal the means to repel in all circumstances force with force.

[1] Annexes 71 and 48.
[2] Vol. i, p. 552 [558].

For, gentlemen, paragraph 2 tells us that the pacific stipulation of the first paragraph cannot be applied when the debtor State refuses or fails to
[140] make answer to an offer of arbitration. But, at what moment and in what circumstances can the offer of arbitration intervene; at what moment and in what circumstances can refusal of arbitration be regarded as a *casus belli?* Therein lies the gist of the entire matter; and I cannot do otherwise than base it upon the ground of Venezuelan constitutional law, in order to explain satisfactorily the vote of my delegation. When, in our country, we are to approve contracts entered into between the executive power and nationals of a foreign State, the legislative power must, in the first place, examine and see if these contracts have been concluded in conformity with the federal constitution. Now, our constitution declares that these contracts must necessarily contain the clause that doubts and controversies of any nature that might arise in consequence of them, shall be decided by the courts of the Republic in conformity with the national laws, without giving rise to diplomatic claims. Furthermore, the societies that might be formed in virtue of the said contracts, shall be Venezuelan societies and compelled to establish their legal domicile in the country. Now, let us suppose that an offer of arbitration were made, either before submitting the controversy to the national courts, or in the course of the suit, and let us also suppose that the debtor State should refuse or leave unanswered such an offer of arbitration,—here, gentlemen, I should not refer to a mere hypothesis, since the case has arisen many a time in several American Republics,—would, in such a case, the stipulation of the first paragraph fall of itself? Why, the iniquity of it would be flagrant; the Porter proposition would only have added an eventual dispute to so many other eventualities that, unfortunately, may still disturb the pacific relations between the Powers; finally, the principle of national sovereignty, incorporated in the political constitution, would be jeopardized, and exposed to the caprice of the creditor State that might desire to secure a privilege for its nationals by protecting them with its army or its fleet, without bearing in mind that these nationals would have begun by violating their word in themselves, violating the contract they might have signed and in releasing themselves from a jurisdiction freely and previously consented to. If, on the issue of this discussion, that is the interpretation to be put upon the second paragraph of the American proposition, the Venezuelan delegation will vote against it.

I beg of my honorable colleagues not to try and find in my words any intention to degrade the principle itself of arbitration. I have the honor of representing a country whose founder, Bolivar, was the initiator on the American continent, in the beginning of the nineteenth century, not only of obligatory arbitration, but even of a Permanent Arbitration Court and of a Peace Conference. I have no need, gentlemen, to recall to your minds the Panama Congress of 1826. And we have religiously preserved this tradition of the international policy of our liberator, to such a point that our constitution contains an article directing that in international treaties it shall always be stipulated that all differences between the contracting parties shall be decided through arbitration, without appealing to the sword.

But let me return to my suggestion of but a moment ago. It seems to me that the defect of the second paragraph of the American proposition consists rather in a, . . . how shall I express it? . . . in an exuberance of form. Having tried to encompass too much, it permits the essential part of the propo-

sition to escape through the use of an awkward "*however*." To my mind, the difficulty might perhaps be avoided by leaving the paragraph in about this form;

> This stipulation is not applicable when a debtor State, which has accepted an offer to arbitrate, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

In this manner, the competence of the national courts would not be brought into discussion whenever it is recognized by the contracting parties; recourse to international arbitration would be had only when it is admissible, that is to say, at the moment when the contract debt should have become a case of [141] dispute between one State and another State, and a considerable number of States whose national legislation is, in the main, the same as that of the Venezuelan Republic, a legislation which has followed, I believe, that of the United States of America, would have no occasion to make reservation.

I dare hope that an amendment along the line indicated would be absolutely conformable to the object of the American proposition, all the more so because his Excellency General PORTER in replying in the committee of examination to remarks made by his Excellency Mr. DRAGO and by his Excellency Mr. MILOVANOVITCH, stated [1] that he could not "consent to the suppression of the reference to armed force demanded by the delegations from the Argentine Republic and from Serbia," but that he desired it to be understood "that this extreme means is solely reserved for the case of refusal to carry out an arbitral decision." It does not devolve upon me here to discuss why our eminent colleague, whose high thought and perfect loyalty I am one of the first to acknowledge, does not find himself able to consent to the suppression of force in a peace conference; but I believe that I remain within my rights in requesting him to tell us, in the Commission, whether the commentary to which I have subjected the report just cited, translates exactly the scope of his proposition, or else, if he will be kind enough to take into consideration the amendment that I have made free to suggest, in a spirit of conciliation and with a view of obtaining the desired unanimity.

His Excellency Mr. **Prozor**: From the very beginning, the Russian delegation has approved of the principle of the proposition which is now brought up once more in a modified form. This new phraseology does, in our judgment, set forth its character in even a stronger way. Very clearly, the Powers declare in the first paragraph the object that they propose unto themselves to attain: to avoid armed conflicts between the nations in a definite case where, in fact, the nations have repeatedly had recourse to armed force. But with no less clarity, the second paragraph declares that if force is removed, it is only with the idea of replacing it by the right constituted and organized by the Conference of 1899 as indicated by the third paragraph of the American proposition. Whoever refuses this solution in the case now under discussion, does not desire the substitution for force of the right thus conditioned. In these circumstances, the former régime continues, therefore, with all its eventual consequences.

We believe that it is impossible to state with greater precision the point which, since 1899, the conscience of the civilized world has reached. We believe that this fact ought to be sufficient to make us sacrifice all reservations bearing upon the formula. As for ourselves we will do so willingly and heartily, believing as we do that the decision which is about to be taken and the agree-

[1] *Report*, vol. i, p. 553 [558].

ment which will be reached in consequence, will be a testimony of the powerful impulsion emanating from the work of our predecessors, the importance of which will thus be set into full evidence.

The measure which we are about to record is a fair presage for the future of the Peace Conferences; it will be a victory which others will follow sooner or later within the field in which it shall have been won.

His Excellency Mr. **Claudio Pinilla**: I take the liberty of saying a few words to explain the vote that I shall cast with regard to the proposition under discussion.

Gentlemen, since 1899 there has existed the Convention for the pacific settlement of international disputes.

The First Commission has just concluded its study of the development and of the improvement of the Convention which I have just referred to, and has added to it an Article 53, reading as follows:

> The Permanent Court is competent to settle differences arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted.

[142] Our Commission has voted in favor of an obligatory arbitration treaty for a restricted number of cases.

In none of these conventions or treaties has the Conference established a sanction such as the use of force for the recovery of contract debts of States, for it is understood that when two nations submit to arbitration, they have mutually promised one another to accept, in good faith, its results. It has nevertheless been desired to make an exception for a certain category of pecuniary matters.

Nevertheless, the use of coercive measures is not of such a nature as will furnish to debtor States resources, the lack of which might have compelled them to suspend their obligations temporarily.

It seems to me, therefore, that the acceptance of the proposition before us will but mean the legitimation by the *Peace* Conference of a certain class of *wars,* or at least interventions based on disputes which relate neither to the honor nor vital interests of the creditor States.

In consequence of these forceful reasons, the delegation of Bolivia regrets not to give its entire assent to the proposition under discussion.

His Excellency Mr. **José Tible Machado** expresses himself as follows:

With great satisfaction I shall adhere to the proposition of my eminent colleague General Porter, the delegate from the United States. I must state, however, that the delegation from Guatemala regards the American proposition, the spirit and intention of which it appreciates, as in no way referring to, properly speaking, state loans or public debts. In my judgment, this results from the text itself; but I have desired to again remark upon this fact before voting in favor of ratifying, as I shall do, the reservation, which I have already presented [1] and which expresses—

> that Guatemala reserves unto itself the right not to accept arbitration, save when foreign *ressortissants* in dispute with the Government for the recovery

[1] *Report,* vol. i, p. 550 [556].

of debts arising from contracts entered into with the Government, shall have exhausted all legal remedies which the laws of the country grant to them.

Mr. **Max Huber** states that the Swiss delegation has already had occasion to declare how highly it appreciates the humanitarian spirit by which the proposition of the delegation of the United States of America is inspired. At the same time, however, it has taken care to explain why it is that it cannot admit of its consequences.

The Government of the Confederation cannot subscribe to a proposition for which, it is true, it has entire sympathy, but which means to submit to international arbitration differences which, by their very nature, come within the exclusive competence of national jurisdiction.

In these circumstances, and as early as our meeting of July 27, last,[1] the Swiss delegation associated itself with that of Roumania in requesting that this matter should form the object of a special convention. This proposition not having been accepted at the time, the Swiss delegation, in the committee of examination, was compelled to vote against the project which is now submitted to us.

Since it appears, however, to be duly established that the desire expressed by the delegations from Roumania and Switzerland shall be given due consideration, I am happy in being able to state that on this condition, the Swiss delegation will replace its negative vote with an abstention, which means that the Federal Government cannot adhere to the Convention under discussion and intends to take no interest in it.

His Excellency Mr. **Luis M. Drago,** desires, in the name of the Argentine delegation, to reiterate in the Commission those reservations which he has already made in the committee of examination.

[143] His Excellency Mr. **Mérey von Kapos-Mére** states that the Austro-Hungarian delegation accepts without reservation the proposition of the United States of America.

His Excellency Mr. **Gonzalo A. Esteva** expresses himself in these terms: The Mexican delegation will vote in favor of the proposition, and repeats the interpretation which it has had the honor to present in the first subcommission, that is to say, that the channels of diplomacy will be resorted to only after every recourse before the courts of the country has been exhausted.

His Excellency Mr. **Carlos G. Candamo**: The Peruvian delegation will vote in favor of this proposition with the reservation contained in the amendment presented to the subcommission under date of July 16, 1907.[2]

His Excellency Mr. **Eusebio Machain**: The Paraguayan delegation will vote for the proposition under the same reservations as those made by his Excellency, Dr. Drago, of the delegation from the Argentine Republic.

His Excellency Mr. **Keiroku Tsudzuki** states that the Japanese delegation accepts the proposition of the United States of America without reservations.

His Excellency Count **Tornielli**: In the meeting of July 27, of the first subcommission of the First Commission, I had the honor of formulating

[1] Eighth meeting of the first subcommission of the First Commission.
[2] Annex 53.

in the name of the Italian delegation, certain requests for information, and certain reservations regarding the proposition of his Excellency General PORTER. It was only under these reservations that the Royal delegation gave its adhesion to this proposition.

But, in the meeting of September 3 of the committee of examination A, his Excellency General PORTER has given information regarding the amended text of his proposition, and the Italian delegation, on its part, after having explained without encountering any opposition, the meaning which it attributed to these explanations, has withdrawn its former reservations. All this, which took place in the committee of examination, should be recalled here in order that record of it may be kept in the minutes of the Commission.

His Excellency Mr. **Beldiman** desires to ascertain if the proposition of General PORTER will form the object of a separate convention.

The **President** replies by stating that such has been the constant desire of the delegation of the United States.

Mr. **José Gil Fortoul** declares that through its silence in this discussion, the delegation of the United States of America leaves in doubt the scope of its proposition; he declares that he will vote against the second paragraph which admits cases in which the use of force would be permitted.

Mr. **Francisco Henriquez i Carvajal**: The American proposition is again brought before us with a modified text in which we no longer find the condition of the guarantee with regard to which the delegation from the Dominican Republic had made reservation. But, on the other hand, a clause has been inserted into the second paragraph which makes it necessary for the delegation from the Dominican Republic to formulate a new reservation. This clause is as follows: "Or makes it impossible to establish the *compromis*." Is this condition to be judged only by the plaintiff State? This would be an exorbitant privilege.

This matter of the impossibility for the parties in dispute to reach an understanding with regard to the establishment of the *compromis* is viewed and settled in an equitable manner in Article 53 of the new text which we have just voted, of the Convention for the pacific settlement of international disputes. It seems to us, therefore, that it is the system advocated in the said Article 53 which is applicable in the case of the American proposition, and, in con-
[144] sequence, we cannot accept any other method that might issue from the second paragraph of this proposition.

It is with such a declaration and with the reservation resulting therefrom that the delegation from the Dominican Republic will vote in favor of this proposition.

The **President** declares the general discussion closed and proposes to put the proposition of the United States of America to a vote.

Mr. **José Gil Fortoul** calls for a separate vote upon each article of the proposition.

His Excellency General **Porter** states that his proposition forms one subject and calls for a vote upon it as a whole.

Mr. **José Gil Fortoul** insists upon his motion and appeals to the right recognized in all assemblies to call for a division in the voting.

His Excellency Count **Tornielli** admits the existence of this right, but believes that in the present case we are dealing with a totality upon which it is

desired to secure unanimity. He fears that a division in the voting will prevent ascertaining a general approval of the principle of the proposition.

His Excellency Mr. **Nelidow** believes likewise, that in the present case, a decision might have untoward effects; members who might not approve of one of its paragraphs will always have the right to make reservations.

His Excellency Mr. **Mérey von Kapos-Mére** believes that a separate vote followed by a vote upon the whole subject might give satisfaction to the two opinions represented in the Commission.

His Excellency Mr. **Asser** believes that, the three paragraphs forming a unit, *division* would not be admissible. Nevertheless, he observes that each delegation has the right to propose as an amendment the suppression of one of the paragraphs. This amendment should then be put to a vote before the project itself is acted upon.

The **President,** in order to close the discussion which has arisen with regard to voting upon the proposition of the United States of America advises with the Commission to see if it desires a separate vote upon each paragraph, or a vote upon the whole with the privilege for each member to make reservations.

By fifteen votes against twelve, and eighteen abstentions, the Commission pronounces in favor of a vote upon the whole.

The whole proposition receives thirty-seven favorable votes, while six members abstain from taking part in the voting (Belgium, Greece, Luxemburg, Roumania, Sweden and Switzerland).

Venezuela casts its vote in favor of the first paragraph and against the two others.[1] The Argentine Republic, Colombia and Ecuador vote "yes" with reservation in regard to the second paragraph.

The Commission passes on to the third item of the program: general discussion of the report of Mr. James Brown Scott concerning the Court of Arbitral Justice.[2]

His Excellency Mr. **Gonzalo A. Esteva:** In the meeting of August 3,[3] the Mexican delegation stated to the Commission that because the principles which were to serve as a basis for the constitution of the new permanent court were of the highest importance, it would reserve its final vote until such time when it would have acquainted itself with the various projects that should be proposed for the constitution of this court.

[145] In the committee of examination the Mexican delegation consistently opposed the project of a Court of Arbitral Justice presented by the delegations from Germany, from the United States of America and Great Britain, and denied it its favorable vote for the reason that this project was founded upon a principle which is contrary to the equality of the nations.

In view of the fact that Articles 6, 7 and 8 concerning the basis referred to, have been eliminated from the project, the Mexican delegation declares before the Commission that, conformable to the last instructions from its Government, and impelled by the desire to reach an understanding between the various opinions, and to secure also a settlement of this matter which has been pending for such a long time, it will vote in favor of the amended motion of

[1] See vol. i, p. 555 [561].
[2] Court of Arbitral Justice, see vol. i, ninth meeting, pp. 326-329 [332-335].
[3] Tenth meeting of the first subcommission of the First Commission.

Sir EDWARD FRY, a motion which tends towards that result, while leaving it with the Governments either to adopt or not to adopt the present project for the formation of the new court.

While casting its vote in favor of the project, the Mexican delegation hopes that a spirit of justice and of equity will govern the understanding between the Powers with regard to the election of the new judges and the constitution of the court, and that in this connection regard may be had for what Mr. SUMNER stated in the Senate of the United States on March 23, 1871: We must not do to a small and weak nation what we would not do to a great and powerful people, or what we ourselves would not stand for, if it were done against ourselves. (*Applause.*)

His Excellency Mr. **Carlin** expresses himself in these terms:

In the name of the Swiss delegation, I desire to emphasize the point of view taken by my Government with regard to the *vœu* relative to the creation of a Court of Arbitral Justice.

This *vœu* relates to a draft convention which is incomplete in its essential part, that part which deals with the very constitution of the court which it is desired to create. For weeks now, statesmen and jurists, chosen from amongst the most eminent of our colleagues, have devoted themselves to the arduous work of finding a manner of constitution which, at the same time, would take into account both the immutable principle of the absolute equality of sovereign States, and the exigencies of a court which, necessarily, can be composed only of a restricted number of members.

They have not succeeded in solving the problem. Will the Powers to whom the *vœu* before us is directed, be more successful? I doubt it.

But, since there is laid before us a plan which is silent upon the manner of constituting the court, and in view of the fact that it is desired to postpone the study of this highly knotty question, it is useless to insist further upon this point. What I wish to set forth, and I do so with the greatest pleasure, is that in the course of the discussions concerning the so-called Arbitral Court, it has been admitted that the primordial principle of international law, the principle of the absolute equality of sovereign States, was perfectly intangible.

In the incomplete form in which the organ which the committee of examination calls "Court of Arbitral Justice" is presented to us, it cannot be reproached for disregarding this principle. But this is not sufficient to make it invulnerable against criticism.

As has been so well and so eloquently stated, since the opening of the Conference, by some of our most eminent colleagues, especially by their Excellencies Mr. BEERNAERT and Mr. BARBOSA, the free selection, by the parties in dispute, of judges called to decide upon controversies between States must subsist as an essential element of all arbitral justice, as the emanation of the sovereignty itself of these States. According to my Government, this fundamental rule and the juridical equality of the States must both be kept intact.

[146] The court whose creation we are urged to recommend to our Governments would be called upon to judge international controversies directly affecting the very interests of the States in dispute. For this reason the Swiss Confederation sets great value upon maintaining the free choice of arbitrators by the parties. This choice is so intimately involved in the very nature of arbitration, especially in matters of an international character, that if it were

meddled with, the very institution which it is desired to develop, would be weakened.

The irreducible complaint resulting from what precedes in regard to the project of the committee of examination persists in spite of the purely optional nature which it is meant to give to the jurisdiction of the new court. This concession cannot be accepted in place of the free choice of the arbitrators by the parties. For there is no need to try and conceal the fact that when it shall have been created the new court will profit by the external and technical advantages (permanency, gratuity, etc.) with which it is proposed to unite it, and that for that reason its necessary effect would be to relegate to last place the Permanent Arbitration Court which was founded in 1899. This is an effect which Switzerland regards as very regrettable and very dangerous, and for this reason she entertains strong and legitimate fears with regard to the project, the adoption of which we are being urged to recommend to our Governments. Add to this the further fact that, although it is stipulated in the first article of the project that recourse to the new tribunal would remain purely optional, the State which for good reasons should refuse to accept this jurisdiction admitted by the other State with which it is in dispute, would find itself in an unfavorable light with regard to public opinion. There would always be a certain moral, if not a juridical pressure in favor of this new court, and this pressure would be really permanent.

For these reasons, Switzerland would be unable to accept the project which is now laid before us, even if it were possible to constitute the court in a manner satisfactory to all the States. My Government believes that instead of creating, by the side of the present court, a new tribunal organized upon entirely different bases which give rise to the fundamental objections which I have just presented, it would be best to remain within the field of the work of 1899, that is to say, to preserve the present nature and composition of the Permanent Court and to find *within these limits* those improvements of which the operation of this institution might be susceptible.

The court which is not constituted and which we are urged to recommend for adoption by our Governments is arbitral in name only, and for this reason the Swiss delegation cannot assent to the *vœu* adopted by the committee.

Mr. **Francisco Henriquez i Carvajal**: Through the means of a written statement, the delegation from the Dominican Republic, on July 17th last, expressed its intention to favor any proposition which might be presented to the First Commission in favor of obligatory arbitration. In adopting this attitude, the Dominican Republic did but conform to the decision reached at the last Pan American Congress, which met at Rio de Janeiro in 1906, by the representatives of nineteen sovereign States of America, to ratify their adhesion to the principle of arbitration. The Dominican Republic was at one with the other American States in this resolution. The long discussion which took place regarding the questions relative to arbitration, within this commission, and within the committees which have been charged by it with the arduous elaboration of the convention project which we have just adopted in the last two plenary meetings of the same commission, has been especially favorable to the realization of the position which every State holds with regard to this matter; that of the whole of America coincides exactly with its attitude at the congress of Rio de Janeiro.

[147] But the delegation from the Dominican Republic has had still other reasons to pronounce itself categorically in favor of obligatory arbitration and of the international Court of Arbitral Justice which, in its opinion, is the most logical consequence and the most efficacious instrument to make of international law a body of laws and of principles uniformly applicable and obligatory for all the States. For a long time past, the principle of international obligatory arbitration has been incorporated in the body of constitutional law in the Dominican Republic. According to one of the articles of the constitution of our country "the Powers which are authorized to declare war may not declare such war without having previously taken all necessary steps to solicit the good offices of some friendly Powers to the end of submitting to arbitration the controverted point which is the cause of the dispute." And, on the other hand, the same article in its second paragraph, imposes upon the Government the obligation of introducing into all international treaties which it might conclude the following clause:

> All differences that might arise between the contracting parties must be submitted to the arbitration of one or several friendly Powers, before appealing to a settlement by arms.

It is the consecration in the internal and constitutional law of a State of a principle which must prevail in international law and which, nevertheless, still meets in the assembly of the nations with great difficulties in being universally accepted.

Our vote in favor of obligatory arbitration leads us logically to the acceptance of the convention project for the establishment of a Court of Arbitral Justice. This permanent court, an effective court, a court objectively existing in a definite place and within a time previously determined, represents the most natural international organism whose duty it shall be, by its juridical and frequent labors, to make a living reality in the relations of independent States of those few principles which we have adopted, and which are only the germ of a nascent right expected to unfold itself subsequently.

Still, while voting in favor of the convention project for the establishment of an international Court of Arbitral Justice the delegation from the Dominican Republic cannot accept the plans hitherto proposed for the composition and the choice of the judges of the said court. In spite of the material differences in the population, in spite of the territorial area, in spite of the wealth, the political position and influence in the world and even of scientific culture existing between the various States which are to cooperate in the formation of this great international tribunal, it is evident that no present reason exists to sacrifice in the plan of composition the fundamental principle of the equality of the States and especially with regard to the individuals, before the law, in those nations where such equality exists.

Our reservation upon this point does not, however, imply for you despair of ever reaching an international agreement by which a final understanding may be attained upon this question. No formula hitherto presented has been found satisfactory, for the reason that all are prejudicial to the principle which must be upheld; but while it is difficult to find such a formula, the task is not an impossible one. It is merely a matter of time. With confidence in the future the delegation of the Dominican Republic will vote in favor of any proposition

formulated in such a way as to make it clear that this matter of the establishment of an international Court of Arbitral Justice may not be given up, but, on the contrary, recommended to the different Governments represented in the Conference in the hope of reaching an understanding with regard to a plan for the composition of the said Court of Arbitral Justice.

His Excellency Mr. **Brun** speaks as follows:

The Danish Government entertains the greatest sympathy for any application of the idea of international arbitration; but it has not been able to
[148] convince itself of the utility of the establishment of a Court of Arbitral Justice as viewed in the proposition which is before us.

The Permanent Court instituted in 1899 seems to us to have given satisfaction; the only fault we find with that court is the fact that it is too costly; but this is a fault which affects only the parties to the dispute and a fault which might probably be remedied in the next conference.

But the Court of Arbitral Justice seems to the Danish Government to be contrary to the very essence of the idea of international arbitration which would have the parties in dispute freely choose their arbitrators in each particular case.

It would render the Permanent Court of 1899 useless, and in our judgment, it would nevertheless be unable to find enough work for its judges, while at the same time it would require considerable annual expense on the part of all the States many of which might perhaps never have occasion to have recourse to it.

In our judgment, there is still another serious objection: the fact that up to the present time no practical and just solution of the problem of the composition of this court has been reached; and I desire to add now that the proposition of a rotation not recognizing the absolute equality of the States would not be acceptable to the Danish Government.

In these circumstances I have been authorized to abstain from voting when the proposition which is now under discussion shall be brought to a vote.

His Excellency Mr. **Ruy Barbosa** delivers the following discourse:

Animated by the spirit of understanding and harmony which has inspired it throughout this Conference, the Brazilian Government, in reconsidering its former instructions in accordance with which I expressed myself in the committee of examination B, against the proposition of Sir Edward Fry, has now authorized me to act as might seem to me most appropriate, and to vote in its favor, if, as the Government itself, I should recognize the wisdom of this modification in our attitude.

In view of these powers, and inspired by the same desire of conciliation from which I have never departed in the discussions of this assembly, I declare that Brazil will accept as a compromise in good faith, the *vœu* proposed by the delegation from Great Britain and supported by that from the United States of America.

In doing so I am nevertheless charged by the Brazilian Government to emphasize in the clearest manner possible that it considers as implied in this vote the recognition of the principle of the equality of sovereign States and, in consequence, the absolute exclusion in any future negotiation concerning the constitution of the new court of arbitration either the system of periodicity or of rotation in the distribution of the judges, or of the system of their choice by foreign electors.

In the hope that we shall not depart from this line of conduct, we trust

to the loyalty of the Powers put at the head of this initiative, to their honor as well as to their prudence, convinced that in our present position they cannot perceive the slightest departure from the juridical claims asserted by us in this matter. On the contrary, we act as we do merely to be of service to and to consolidate these claims, by returning to them at some future date which, it seems to us, will confirm their triumph.

But, by agreeing now to this concession, you will permit me, now that I am speaking to you in this Conference for a last time, to explain and to defend ourselves by insisting upon the advantages brought about through our resistance which has been unjustly criticized by those who were of a different opinion.

It is my desire to ever spare you the annoyance of my discourses. To-day, [149] more than ever, I would spare your time and good humor. At the end of our present labors, I should like to leave with you, through my silence, a good impression. It is with reluctance that I follow at present a different line of conduct. The sacrifice which a discussion imposes is frequently a necessity which is no more agreeable to him who pronounces it than to those who have to listen to it. It is because it is not always easy to do one's duty nor easy to tolerate such duty on the part of one's neighbor.

Why did we resist?

In the first place because in an affair in which so much is made of *vital interests,* it is inconceivable readily to sacrifice a *vital right.*

In truth there is not a right more worthy of being termed *vital right* than that of the equality of sovereign States.

In the next place we resisted because alongside of the supreme necessity of preserving this right, we were bent upon preserving another one not less essential and not less inalienable: that of always insuring to international justice its arbitral character, with the inherent right of each party to choose its judges.

Finally, we have resisted to the very last in view of the consideration that if, in spite of the interest and feeling evinced within this Conference by the majority of its members and in particular by those of the highest prestige, for the purpose of securing an acceptable formula for the composition of the new arbitral court, successive failures have been met with, it was owing either to the fact that the thing is impracticable, or because the time is not yet ripe for the hatching of this inconsistent and hazardous novelty.

It seems to us, therefore, that the part of wisdom should be to await the meeting of the next conference. This proposition is not considered desirable, but why? Why should we be in such great haste?

It arises from a tendency to whose adventurous nature I have already called your attention; it takes us rapidly away from the caution which presided over the labors of the Conference of 1899, by substituting for arbitration which is the form of justice for sovereignties, a jurisdiction of which we had never before dreamed in connection with international affairs except in our idle dreams of Utopia.

The peril of this adulteration of arbitration, of this seductive but dangerous illusion, was foreseen and denounced in 1899 in the First Conference, through a voice which has succeeded in constituting itself the oracle of the Second Conference. There is no need of my naming to you our illustrious President, Mr. Léon Bourgeois. This truly rare statesman, both for his gift of eloquence and

for his strength of mind and sincerity of heart, said at the time, when inaugurating the labors of the Third Commission, in the meeting of June 9, after having dealt with the purely optional nature of recourse to a permanent arbitration court:

> It is in the same spirit of fundamental prudence and with the same respect for national sentiment that the principle of permanent tenure of office by the judges has not been included in both drafts. It is impossible in fact to avoid recognizing the difficulty in the present political condition of the world of forming *a tribunal in advance composed of a given number of judges representing the different countries and seated permanently to try case after case.*
>
> This tribunal would in fact give to the parties not *arbitrators,* respectively chosen by themselves with the case in view and invested with a sort of personal warrant of office by an expression of national confidence, but *judges*[1] in the private law sense, *previously named without the free choice of the parties. A permanent court, however impartial the members might be, would run the risk of assuming in the eyes of universal public opinion the*
> [150] *character of State representatives; the Governments, believing that it was subject to political influence or to currents of opinion, would not become accustomed to come to it as an entirely disinterested court.*[2]

Nevertheless, an attitude, which at the time everyone exalted as the expression of wisdom itself, has now, in similar circumstances brought to us aggression and coarse offense. Within these precincts I should not refer to them if it were not for the fact that they have had the most unexpected and the most regrettable echo in the most important European daily press. From these heights and with the authority of a formidable prestige, language has been resorted to which bluntly offends the public and material truth of our acts, to the detriment of the fair name of the Latin States of America, ill treated without rhyme or reason, solely because they dared defend their rights with their votes.

You who have been the witnesses of the innocence of those accused take note of the virulence of the calumny.

> The fate of the project for the creation of a new arbitral court, so it was stated, is the criterion of the incapacity of the small States as regards practical politics. They have insisted that each State, no matter what might be its material, moral and intellectual condition, should have an equal representation in the tribunal. Learning, character, experience and armed force, all these count for nothing in the opinion of these uncompromising doctrinaires. Haiti and the Dominican Republic, Salvador and Venezuela, Persia and China, all these are sovereign States. Therefore, so they reason, it will be necessary that each enjoy the same rights as Great Britain, France, Germany and the United States, in the settlement of the most subtle controversies of law and of fact between the greatest and the most enlightened States of Europe. Their reasoning, with such premises, is irrefutable, and *these premises are the bases of the Conference itself. From a juridical*

[1] The word *judges* and but a few lines further up, the word *arbitrators* are both put in italics in the official text in the discourse of Mr. Bourgeois.

[2] This passage has been reproduced by Mr. Bourgeois himself in his report to the French Government, December 31, 1899. See the *Yellow Book* upon *La Conférence Internationale de la Paix,* 1899, pp. 35-36.

and diplomatic point of view the argument is perfect, but, unfortunately there is no sense to their conclusion. No other illustration can be found to set into stronger relief the faulty composition of the Conference. Hence, *in view of the fact that the great Powers are not at all disposed to put over them, as their judges, the most corrupt and the most backward States of Asia and of South America,* we shall not yet have the arbitral court.

It is very fortunate that we have been credited with having reasoned in an irrefutable juridical and diplomatic manner. This is no small matter. It is thought proper to modify the bases of the Conference itself in order to shake the foundation of our reasoning. This is no small concession to make. Nevertheless, although our premises are irrefutable, still the conclusion is held to be without sense. Lo and behold, how this thunderbolt of wisdom does its work!

But, in the first place, is there more logic and practical common sense to be met with in the considerations that have been set forth against our arguments? Between States even as between individuals, there are of course diversities of culture, of honesty, of wealth and of strength, but will this fact create any differences whatever as regards their essential rights? Civil rights are the same for men everywhere. Political rights are the same for all citizens. Lord KELVIN or Mr. JOHN MORLEY have the same vote in electing the august and sovereign Parliament of Great Britain as the ordinary workman dulled by work and misery. But, is the intellectual and moral capacity of this laboring man, who has been degraded by suffering and distress, equal to that of the
[151] statesman or of the scholar? The fact is that sovereignty is the elementary right *par excellence* of organized and independent States. Now sovereignty means equality. In principle and in practice sovereignty is absolute. It brooks no ranks, but the jurisdictional distribution of right is a branch of sovereignty. Hence, if between the States there is to be a common organ of justice, all the States must, of necessity, have in it an equivalent representation.

Nevertheless, classification is desired. Who will take upon himself the responsibility of making this classification? The powerful States. It is they which excel both in power and in culture. Therefore, they would be our most natural classifiers. But have we not already tested their classifying capacity in a matter similar to the one which is now under discussion? They have done all that was in their power to give us their best model of this capacity in their project of the prize court. To accomplish this they had to take only material measures: navigation, maritime commerce and war navy. Not to make any mistakes in the settlement of this matter it would have been sufficient to consult statistics. Well, they neglected to avail themselves of a study of statistics and they committed manifest injustice of which I have already furnished you the mathematical proofs. Now if this has been the experience in that particular field, in which, to be quite fair in our criticism we need only to make use of our eyes, what would be the result in case we were to rank the weaker nations according to the vague and elastic criterion of independence, morality and culture? But while it is certain that we have claimed for each State a seat in the Court of Arbitral Justice, it is not at all true that we have endeavored to subject the greater States to the judgment of the lesser ones. We have not tried to do this. The assertion, though false, has nevertheless been made. We have denied

it. And now the same false play begins all over again. But it will never cease to be false play.

The text of the Brazilian proposition is peremptory. In its Article VI it declares:

> The parties in dispute are free to submit their controversy to the full Court or to choose from the Court, to settle their difference, the number of judges that they agree upon.

Can anything be more categorical?

We have, in consequence, conferred upon the great Powers, even as to all the rest, the absolute right of not being judged, not only by the American States without honesty, but even by the stainless European States. We have granted to all of them the liberty, *without restriction,* of choosing their judges, and, in consequence, the most absolute certitude of not being judged except by those that have their complete confidence.

Furthermore, I should never imagine that such outrages were meant for my country, if I did not realize that they were expressly directed against it in the defamatory campaign waged by a transatlantic journal in which it has been said that the great Powers would never consent to have their disputes settled through arbitration by such States as Brazil, Haiti or Guatemala. Guatemala or Haiti are not in need of my defending them. I shall confine myself to my own country.

To permit of such language against Brazil, the history of international relations in the last quarter of the nineteenth century must be lost sight of. If it were not for this ignorance, one might well have realized that of all the countries of Latin America, Brazil is the only one where the great Powers, especially the United States, have gone to secure arbitrators. In the most famous of arbitrations, the affair of the *Alabama* between the United States and Great Britain, the treaty signed by the two parties at Washington on May 8, 1871, created the Geneva Court, in which one of the arbitrators was a Brazilian diplomat,
[152] Viscount D'ITAJUBÁ. In the Franco-American Court of Washington, established to settle the claims of the two Powers in dispute, in accordance with the Convention of January 15, 1880, the presidency of that Court went to Brazil, in the person of one of our diplomatic representatives, Baron D'ARINOS. Finally, the four mixed arbitration commissions that operated from 1884 to 1888 in Santiago de Chile, to pass upon the claims of England, of France, of Germany and of Italy against this South American State, were successively presided over by three Brazilian counselors, LOPES NETTO, LAFAYETTE PEREIRA and AGUIAR D'ANDRADE.

Those not acquainted with these facts may inform themselves of the first two in the work of JOHN BASSETT MOORE, the distinguished North American internationalist. They will see, furthermore, that in the case of the Washington Court and upon the prorogation of its labors, the Governments of France and the United States, by mutual agreement, addressed a note to the Government of Brazil requesting it to continue the services of our representative until the close of the affair.

Thus you will see that the most of the great Powers, the United States, Great Britain, France, Germany and Italy have not disdained to submit the settlement of their affairs to Brazilian arbitrators, and even attributed to them

the high position of the presidency in courts established to pass judgment upon them. Therefore, we were not preoccupied by our own interests when we demanded for the States of only secondary importance a seat beside the great, for our right to such honor has long since been recognized with a special solemnity by the agreement of the Powers, and we should be the last ones to be unclassed by them now when, after a space of twenty-five years of an ever-growing prosperity, we have grown twice as important from the point of view of population, culture, wealth and strength.

In 1870, in 1871, in 1880, and from 1884 to 1888, Germany and Italy have solicited us, each once, to furnish arbitrators, and France, England and the United States, each twice. This is a distinction which was conferred upon no other American State, except the United States.

But lo and behold, to-day they would scoff at the States of South America, at our expense, by representing as a great absurdity the possibility that a great Power might accept arbitration on the part of Brazil. Isn't it now for us to laugh at this idea?

Nor is it true that if the nations have not been provided with another arbitral court, the blame for this must be laid at the door either of Asia or of South America, where reside ignorance and corruption. No that is not the case at all. The facts are an overwhelming testimony against this invention.

The South American and Asiatic States are but a minority in the Conference. They do not even exercise there a right of veto upon the discussions of the majority. If the projects there presented by the great Powers, in order to solve the problem of the composition of the new court, do not come to a successful ending, it is because the great Powers themselves have disapproved of them.

They have formulated but two solutions for the problem. The first of these was the Anglo-Franco-American proposition. But all the great Powers, including the two that collaborated with the United States, that is to say Great Britain and Germany, have given it up both in the subcommittee of seven and in the committee of examination B. The United States itself, confronted by this unanimity, has not clung to its own work, and thus the system of rotation, with the classification of the States, came to its end.

The other solution was that of the election of the court. It was presented by the American delegation to the committee of examination B, September 18, and in that same meeting it met with its adverse fate, for it secured but five votes against nine. Among those nine votes, apart from four States of
[153] secondary importance, Belgium, Brazil, Portugal and Roumania, there were five great Powers: Germany, Austria, Great Britain, Italy and Russia. Of the great Powers the proposition of the United States was supported by France alone, apart from the Netherlands, Greece and Persia.

Therefore, in one case it is *the unanimity of the Powers,* and in the other, it is *the unanimity less two votes only,* which wrecked the American initiative in this matter.

Thus, if the propulsion of the movement against this measure came solely from us, the great Powers have had a part not less important than ours in the success of the movement. It is they that determined the success of the meritorious work.

I qualify it intentionally as meritorious, for with a magnificent solemnity

and with the general and direct assistance of the nations, it has established the principle of the equality of States. It has here been referred to with disdain. It is riddled with volleys of irony. Along with obligatory arbitration its lot has been to amuse the mind that scoffs. These subtle and elegant shafts all come from the same quiver. In them one would but behold the equality of force. We have demanded equality of right for the peoples. We have maintained that all the nations are equal before the law of nations.

Is not that a work of reason, of straightforwardness and of reality? To those who might dispute it, we might answer by referring them to the lesser idealistic masters in the literature of international law. For instance, take Major General HALLECK of the American army, whose work is distinctive because of the coldness and the realism of his mind. He will tell you:

> . . . all sovereign States, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their political and private capacities, to preserve inviolate.[1]

So then, here we have a soldier whose book, of a rigid and sharp positivism, is not suspected of humanitarian weakness or of pacifist sentimentalism who proclaims the equality of the States as the primordial condition of peace between the nations. And thus it is but in the interest of the general great aspiration for peace that we were working by opposing with all our strength the triumph of inequality in the composition of the international arbitration court.

These then are our reasons, the reasons of the States of Latin America, for not yielding in our defense of the principle that we have upheld. Are these reasons not sufficiently legitimate? We may compromise with regard to interests or with regard to rights or economic worth. But we could not without showing lack of courage, not without deserting the cause and not without shame, compromise with regard to rights in which honor is concerned.

Now, it would seem that in these reasons are found the quarrelsome humor and the political imbecility of the countries of Latin America! The atmosphere about the Conference has been filled with rumors of Brazilian hostility towards the United States.

But this is a ridiculous notion. At the time of the discussion of the project which has brought division between us, our Government spared no effort to obviate this mistake. We were not listened to and in this way we were urged to the disagreement of which we are accused. But this disagreement was confined to the two cases in which necessity was unavoidable; first, the matter of the classification of sovereign States which would uproot inter-
[154] national law at its very sources, and then the matter of the prize court, the organization of which, without reason nor possible pretext, robbed us of a manifest right. Apart from these two cases, we have sup-

[1] HALLECK, *International Law*, third edition, London, 1893, vol. i, pp. 116-117.

ported the United States in all its important propositions: immunity of property on the seas, collecting of contract debts, obligatory arbitration, periodicity of the conferences.

If we have diverged therefrom in the two extreme cases of the transgression of an inviolable principle and of a direct offense against our right, was not this independence our old and well-known habit, even in incomparably less grave matters? When in 1856, our friends of North America invited us to follow them, by refusing to subscribe to the abolition of piracy until such time when capture might be abolished, what did we then do? We expressed ourselves against capture; but we adhered to the immediate extinction of piracy. And yet, we were not at the time confronted with the necessity of parrying a fatal blow against our rights.

At that time we had a population of about 12,000,000 souls. To-day we are a nation of 25,000,000 souls. Well now, the right of having a conscience and of proving ourselves worthy of it exercised by 12,000,000 Brazilians in the middle of the last century cannot be said to have been surrendered by 25,000,000 Brazilians in the beginning of this century! We have always believed that in order to rise to the plane of a noble friendship, it would, in the first place, be necessary to deserve such friendship through respect of ourselves.

Mutual independence does not enfeeble; on the contrary, it must assure and strengthen a cordiality between nations which, by respecting their honor, have, through their history and through their interests, contracted intimate sympathies and necessary relations. Reciprocal justice is the strongest bond of great friendship, and the two greatest States of the two Americas can never forget how they have practiced justice one toward the other, Brazil in the case of the *Alabama* arbitration which is the most memorable in all history, and the United States in the Cleveland arbitral decision. To this we may add the visit of Mr. Root, the latest proof of the solidarity of our hemisphere, and we cannot but conclude that between North America and South America a divergence of opinion may arise upon occasion, but that the soul is the same, the future the same, and that in the future no difference in sentiment may take place.

By looking in this light at the questions solved or adjourned by this Conference, it is a matter of indifference to us if you go on speaking with contempt, under the name of small States, of those that do not yet exercise the power of war, and in proposing, as has been done within certain quarters of high journalism, to substitute in the place of the Conferences, which are aware of the difficulties of right, and prudent in not wanting to upset century-old problems, congresses in which the interests of the strong might be cared for in committees of small membership, with the expectation that the weaker would not forego the honor of giving their approval.

We should, indeed, be curious witnesses of such an experience to-day, for the experience we have had from this Conference in this respect is the fact that the difficulties in the solving of knotty questions are not the result of the resistance of the States of secondary importance, but the effect of the opposition of the great Powers. Remember in this connection, if you will, the abolition of capture, the régime of war contraband, blockade, obligatory arbitration and all the rest. The non-powerful States have been nearly unanimous in their approval of the good, liberal and humanitarian solutions. It is the great Powers that are opposed to these beneficent solutions, or else disagree with one another in the

appreciation of their necessities. I should indeed be glad to see if the lukewarm atmosphere of congresses would have the effect easily to remove these divergences that are so rebellious to the free atmosphere of world gatherings.

As for the other States that are kept in the antechambers with the privilege of acquiescing subsequently, I would call your attention to something I
[155] desire to say. It is the most abominable of mistakes that is being persisted in by insisting upon teaching the peoples that rank between the States must be measured in accordance with their military situation. Now let me tell you of the results of all this, results which are henceforth of greater importance than they have ever been at any time. About three years ago, Europe descried outside of its own political horizon only the United States, as a sort of European projection and the only non-negligible representation in the West. Asia and Latin America were hardly more than geographic expressions with a political situation of complacency. One fine day, to the general surprise, the world seemed to perceive a fearful apparition in the East. This was the unhoped-for birth of a great Power. Japan entered into the European concert by the gate of war, which gate she forced with her sword.

As for the States of Latin America, they were invited in through the gates of peace. We have crossed the threshold of it in this Conference, and you have come to get acquainted with us as workmen engaged in the problem of peace and of right. But, if we should find that we have been deceived, and if we should be turned away, disillusioned with the experience that international greatness is measured by the force of arms only, then, through your work, the result of the Second Peace Conference would be to deflect the political current of the world in the direction of war, by compelling us to seek in large armies and large navies the recognition of our position indicated, but to no avail, by our population, intelligence and wealth.

Would we not be successful in an attempt to that end? Don't be mistaken in your judgment! These differences of greatness between the countries of Europe and those of America are surely but accidental. In Europe development is a slow process. The soil is already taken possession of. The burden of the struggle for life is crushing. But beyond the Atlantic, in those countries of rapid growth, human sap is like that of our forests: it improvises peoples. We are not deteriorating under the compulsion of military service. We have no social casts, we are not living under the overwhelming heritage of a long past filled with wars. We know only the reproductive debts of peace and labor. In those vast immigration regions where the family freely expands even as those luxuriant flowers of America displayed on the surface of our beautiful tropical waters, it requires at times only one or two generations to double the population of a peaceful and prosperous country. For instance, about fifty years ago, Brazil had a population of not more than twelve or thirteen million souls. To-day it has a population of twenty-five millions. How many will it have twenty-five years hence, if you will bear in mind that the means for peopling its territory have been incomparably increased, that the incoming streams of foreigners steadily increase, and that our far distant existence, hitherto scarcely realized, begins now to reveal itself to the world in its full light?

Now, as regards those events that shape history, what matters the lifetime of one or two generations? In the movement of the world, it marks but

a space between the evening of one day and the morning of the next. Why then should we so readily refer in our discussions to the weak and the strong, the small and the great between the nations? In these times, maturity, as concerns the peoples, sometimes follows immediately upon adolescence. In the hurry of this era of acceleration, the future invades the present. And the future is always full of inversions and surprises.

But however this may be, the competence, the benefit, the necessity of these periodic gatherings of peace, are an irrevocable conquest. It would be impossible to prevent them, to frustrate them, to replace them. For they have opened the gate that will forever remain open. The right of nations will, little by little, pass through it in its entirety. The field which it occupied in 1899 has, in spite of all, expanded to a glorious vista in 1907, and, even as the First Conference made the convocation of the Second necessary, so will the latter render the meeting of the Third inevitable. (*Prolonged applause.*)

[156] Mr. **José Batlle y Ordoñez** takes the floor and speaks as follows:

It seems to me that we did not take the proper course to solve this problem of an international judicature and that, as happens always when one has entered upon the wrong road, we have reached a point when confusion has seized us and we can think of no better idea than that of returning to our point of departure.

To my mind, the error consists in our having allowed ourselves to be led by a tendency to create for the nations, and by their free consent, a judicial organization like that which every nation has established for the purpose of judging the differences arising among the masses, sometimes almost infinite, of the individuals composing them.

In the first place, an international tribunal would lack the proper impartiality for making such a *rapprochement* possible, and, also, the support of force which, in a nation, make submission to the decisions of the judges obligatory.

The impartiality which the Conference has so ardently sought for, can be easily found in a national court, because the judges almost never have relations with the litigants, of whom they have hardly ever heard, and because the interests submitted to their decision are entirely foreign to them. When the judge is by family ties related to the one who pleads, or when he is his friend or his enemy; when he himself has interests that are connected with the dispute or when he has expressed an opinion in regard to such dispute, he can no longer be judge of it, because his impartiality could no longer be absolute.

It may be asked if it is possible to establish an international court the members of which, representatives of nations, or chosen by them, meet, not only for one case, but for several cases, the conditions of impartiality that any national judge must fulfill. It will suffice to bear in mind the small number of nations in existence; to think of the causes that bind them together or keep them apart, such as race, geographic situation, history, their respective interests, and the ever-closer relations created by constantly improving means of communication, in order that one may conclude that the difficulty of finding this ideal court is perhaps insurmountable, at least in the circumstances of our present international life, and all the more so, because the impartiality of the judges ought to be so evident that it might be freely accepted by all the litigants.

It is because of these facts that the idea of a permanent court which we have admitted in principle without difficulty, and even with enthusiasm, has led to

so much opposition when we desired to designate its members. No combination seemed acceptable, and it may be believed that, if this or that combination had been adopted, such an agreement could not have stood the test of time, and that the distrust which from the very beginning might have decreased the prestige of the new institution, would also have lessened the importance of the new arbitration conventions and their number, for, although obligation to submit in the last instance to this court had not been stipulated, it would morally be difficult to refuse to accept its jurisdiction after having been instrumental in investing it with the highest human justice.

But, even supposing that these difficulties did not exist and that we should have been successful in establishing a permanent court as is desired, should we have made real progress? Could we not also oppose to this displacement of the arbitrator by the permanent judge the assertion that the arbitrator is to be preferred to the judge, so that instead of desiring to assimilate the organization of international justice with the organization of that which rules in the relations between individuals, it would be rather desirable that the latter should be sufficiently competent, even as the nations are competent, to choose arbitrators worthy of their confidence and to submit their differences to them?

It is insistently stated that a permanent court would succeed in establishing a very uniform jurisprudence. But, even by leaving aside the idea that this jurisprudence might be erroneous, of what use could it be for a court whose jurisdiction ought to be freely accepted by the litigants? Would the nations hasten to submit to the decisions of this court claims that are opposed to its jurisprudence? On the contrary, it is to be believed that it would be a [157] new source of opposition to the permanent court and that the number of controversies that might be submitted to it would be found to be in an inverse ratio to the extension of that jurisprudence.

The First Conference did a practicable piece of work in creating the present permanent court, for this court offers a large number of arbitrators at the free choice of the nations. The Second Conference had to resort to great efforts to improve that work. Through this means one would certainly have accomplished much in the interest of peace; but one would still be far from having accomplished what one would desire to accomplish. Even to-day, war might threaten to break out at any minute, and in the regulations presented one would not find a single paragraph by which it could be prevented. One would rather find in them authorizations like those relating to the questions in which the honor and the essential interests of the nation were involved.

The idea of the creation of the court of arbitral justice has its origin in the generous aspiration to create a judicial power so magical that all matters would be submitted to it. We have seen that this power would not have the unanimous adhesion of the nations, although all are animated by the desire to see justice triumph. Nor could it rely upon the adhesion of the countries who base their hope of being great on force rather than upon reason and peace. Never can such tendencies be submitted to an exclusively moral power. The Uruguayan delegation had the honor of presenting to this Conference a declaration of principle by which the right to add material force to this moral force was established. But in view of the ideas prevailing in the Conference there was no hope of its being accepted. It merely desired to express it within this representative assembly of humanity. Since so many alliances have been con-

cluded by which to impose that which is arbitrary, it might be well to conclude another alliance by means of which justice might be imposed.

It is true that a judicial authority constituted by the moral and material power of a certain number of nations would not be free from the suspicion of partiality which is opposed to the establishment of the Court of Arbitral Justice. But such an authority would exert its action only after all means of preserving peace had been exhausted, when recourse to arbitration had not been successful, and, in such case, it would no longer devolve upon the parties in dispute to reject decisions that were imposed upon them by an irresistible force. By these means justice might sometimes be injured, but such an evil would be far from attaining to the seriousness of the frequent compulsions of strong countries over the weak, and of the terrible wars that break out from time to time.

These ideas, far though they seem from reality, might find a practicable application, if not in the whole world, at least in a considerable part of it, that is to say, in America where international law has made real progress, a progress exceeding that realized on the European continent and attested to by documents deposited with the secretariat of the Conference. Without referring at all to the United States of America whose love of justice is well known, I desire to cite as one of the most important factors in this progress the Argentine Republic which has concluded treaties with all contiguous countries, Bolivia, Brazil, Chile, Paraguay and Uruguay, with still others that are not physically connected with it, such as Spain and Italy, and by which treaties it is agreed to submit to arbitration all controversies of any nature whatever which, for any reason whatever, might arise between the contracting parties, with the single exception of those that might affect injuriously the constitutional prescriptions of the one or of the other nation. I recall to your mind in this connection that Brazil has proposed to the Conference a formula which, if it had been accepted, would have banished from the world the spirit of conquest which is the cause and the impelling motive of most of the wars. And other important facts also, such as the settlement of boundaries between Argentine and Brazil, between Argentine and Chile, and the limitation of armaments between these two countries, prove that the progress spoken of hereinbefore is not purely theoretical.

Public reason is therefore prepared in America to find broad solutions
[158] for the problems of international peace. Neither the hatred between nations nor ambitions of conquest would be opposed to these solutions, and if two or three of the most powerful republics of that continent were to agree to constitute an alliance which, by greater right than any other might be called holy, the object of which it would be to examine the causes of armed conflicts that might arise between American peoples, and to offer an effective aid to the one that had been unjustly incited to war, there is no doubt that other American nations would group around this alliance, and that the international peace of the continent would no more be disturbed by discussions between the countries forming such an alliance.

For these reasons and cherishing the hope expressed, the Uruguayan delegation will abstain from voting in favor of the project for a court of arbitral justice.

Mr. **José Tible Machado**: With an attention suffused with admiration I have listened to the discourse of his Excellency, the ambassador from Brazil, to

whose talent for oratory and the power of reasoning I am pleased to pay my homage.

The Guatemalan delegation would have confined itself in this discussion to a very brief expression of its adhesion to the arguments with which the fixed principle of the sovereign equality of the States as political entities has been here defended, a principle which, in my judgment, has not been met by the suggested composition of the new arbitral court.

But in reference to some words which, in the discussion of Mr. Barbosa, have impressed me especially, I believe it to be my duty to reply with a few rapid observations. His Excellency deemed it well to repeat before us, and to protest, it is true, against the expression of a newspaper which affirmed . . .

> that the Powers would never consent to having their disputes settled by Brazil, Guatemala or this or some other Ibero-American nation.

I believe it inexact to pretend that the Brazilian project for the organization of the court ever contemplated such a result, and that perhaps it would have been preferable if these remarks had not been here reproduced. If it is a fact that in our modern civilization the press is indeed one of the great forces that lead and direct the world, it would not be less appropriate, to my mind, that while taking the universal public opinion into account, our discussions should never be disturbed by the commentaries of any newspaper, though it were the first in the world. Even as it happened to good old Homer, even so our most distinguished publicists (and also our diplomats) nod on occasion. And where would we arrive if ever we should enter upon that path? . . . Perhaps we would bring here not only quotations taken from these great organs of publicity which, like lighthouses, serve to enlighten and to conduct public opinion, but even others taken from books or sheets which in their desire to guide us, are sent to us at all times by irresponsible correspondents or by anonymous writers.

Newspaper articles, just or unjust, favorable or unfavorable to our views should, it seems to me, be answered in newspaper articles and not in our discussions. But this is merely the humble expression of my personal opinion, and, at all events, I give to his Excellency Mr. Barbosa my thanks for the protest which he made in connection with the words which he quoted to us and, after which, in masterly language, he gave us a striking illustration of the progress made by Brazil both in her economic greatness and in her state of advanced culture.

Permit me, therefore, in my turn to tell you that, although less vast in territory, in wealth or in strength, the Guatemalan nation is also one of those where along with the ardent desire for progress, there reigns the love of peace and freedom. With us arbitration has been an institution long recognized and applied. And at the same Conference of Rio de Janeiro with which Mr. [159] Barbosa is so well acquainted, he will surely recall with what emotion, at its inaugural session, there was welcomed a telegram in which President Estrada-Cabrera of Guatemala announced to the Congress that a treaty of peace, including extended clauses of obligatory arbitration to which his Government had given assent, had just put an end to a conflict with neighboring countries. To be sure, even as the most of the nations of Latin America, we have had our troublous and difficult times, but in time and with the extraordinary

development of our railways, with the growing exploitation of the riches of the soil and, especially, with the administrative morality maintained by a Government, especially regardful of the national interests, Guatemala may contemplate the present with satisfaction and the future with confidence.

In the report of his Excellency Baron GUILLAUME, you have, gentlemen, seen some of the treaties in which obligatory arbitration is stipulated, treaties concluded in recent times by Guatemala, and it is useless for me to say that these treaties, as moreover all our international conventions, have been religiously observed by us. And what is true of Guatemala in this respect, is equally true of other States of Central America, such as Costa Rica, Honduras and our nearest neighbor, the prosperous Republic of Salvador.

The astonishing progress made by Brazil within a quarter of a century was eloquently described by Mr. BARBOSA, and the not less appreciable progress made by Mexico, Argentine or Chile, can but be viewed with sympathy and admiration by the whole world. Guatemala is proud of her great sisters of the Ibero-American family and, permit me to state it with frankness, Guatemala is in her turn, by the adaption to the circumstances of all that constitutes progress in the material or political order, by her respect for the law of nations, by the development of her relations with other nations and by the maintenance of peace and domestic tranquillity, endeavoring worthily to fill the place due to her in the concert of the nations, and she is succeeding.

One detail will no doubt impress you: In Guatemala there exist more than three thousand primary schools, and our population is only two million! Our country has understood the meaning of those words of the most distinguished statesman of Central America:

> All the evils of which our country has suffered arise from the ignorance of the masses,

and it labors, in consequence, to prevent the recurrence of those evils, with an energy and constancy that deserve and receive the sympathy of all.

This is all I desire to say. I close, therefore, with the statement that the Guatemalan delegation heartily concurs in the very clearly stated and eloquently expressed ideas of his Excellency Mr. BARBOSA whose talent and powerful labor do honor not only to the Republic of Brazil but to all Latin America, and who has this day valiantly defended the principle of the sovereign equality of the nations, great or small, strong or weak.

His Excellency Mr. **Hagerup**: The Norwegian delegation will give a favorable vote to the *vœu* proposed by the first delegate from Great Britain, since it recognizes that the creation of a truly permanent arbitration court may certainly lead to advantages in the practice of international arbitration, as well as to advantages for the development of international law in general.

But, in giving this vote, it desires to concur in the statements made by several delegations to the effect that the sole basis of the composition of an international arbitration court must be the absolute and unreserved recognition of the equality of all sovereign States. If, in spite of the silence which the report observes in regard to this capital point, the Norwegian delegation is now enabled to vote in favor of a resolution inviting the Governments to study the question of the establishment of such a court, it is, as already explained [160] by the first delegate from Switzerland, because the discussions, that have

taken place in regard to this matter within the committee of examination B, have convinced us that in the course of the discussions to which the *vœu* submitted to us will give rise, no attempt will be made to violate the above-mentioned principle.

His Excellency Baron **Guillaume:** The Belgian delegation can give its adhesion neither to the project relative to the establishment of a court of arbitral justice, nor to the *vœu* recommending the adoption of the project.

It is unable in advance to declare itself in favor of the creation of an institution of which one of the essential elements, that of its formation and its composition, has not only not been definitely adopted but has met with the most serious objections and encountered difficulties which, to the present time, have seemed insoluble to the committee itself.

It believes that in virtue of its very character, arbitration must be entrusted to arbitrators, that is to say, to judges directly or indirectly designated by the parties in dispute, at a time when it is possible to determine, with full knowledge of the facts, the special aptitudes which it is proper to require in order to pronounce oneself upon disputes to be settled.

Finally, it is its opinion that the institution of permanent arbitration jurisdiction, established in 1899, has not disappointed the general expectation and that it is not necessary to presume that it might disappoint in the future.

His Excellency Mr. **Beldiman** declares that, in the name of the Roumanian delegation, he concurs in the words expressed by his colleagues of Switzerland and Belgium.

He reserves to himself the privilege of presenting, later on, certain remarks upon the project concerning the permanent court.

His Excellency Mr. **Martens** calls attention to the fact that on August 1 he declared that the Russian delegation was ever ready to withdraw its project relative to the creation of a really permanent court, in case a better proposition were submitted. He has found with satisfaction to himself that the idea of the election of the judges, advocated by the Russian project, has been adopted by several of the projects that have been submitted. Nevertheless, he believes it to be his duty to remark that he has not withdrawn the Russian project, although he is aware that the necessary time is wanting for its discussion.

His Excellency Mr. **Lou Tseng-tsiang:** To give proof of a spirit of conciliation and of good understanding, I shall, in the name of our delegation, vote in favor of the *vœu* submitted to us.

Gentlemen, permit me to add to this *vœu* another *vœu* which I ardently cherish and for which I am sure of meeting with the approval of the entire high assembly.

This *vœu* is that henceforth we may no more, as has been done in such a regrettable manner, disregard the sovereign and independent rights and the equality of the States which form the fundamental principles of international arbitral justice, and that the new court foreseen in this *vœu*—in case it should some day be called upon to organize itself—shall have as its basis this same principle of equality which served for the establishment of the Permanent Arbitration Court of 1899.

His Excellency **Samad Khan Momtas-es-Saltaneh** approves entirely of the words expressed by his Excellency the first delegate of China, adding expressly that the imperial Persian Government considers, as included in this vote, the

recognition of the principle of the equality of sovereign States and, in consequence, the absolute exclusion in any future negotiation concerning the constitution of the new arbitration court, of the system of periodicity and that of the rotation in the distribution of judgeships.

The **President** closes the general discussion.

The reading of the articles is postponed to the following day, October 10, at 3 o'clock.

The meeting closes at 7 o'clock.

TABLE REFERRED TO IN ARTICLE I OF THE PROTOCOL OF THE BRITISH PROPOSITION (ANNEX 40)

MODEL OF TABLE TO BE ANNEXED TO THE PROTOCOL OF THE BRITISH PROPOSITION

	Germany	*United States of America*	*Argentine Republic*	*Austria-Hungary*	*Belgium*	*Bolivia*	*United States of Brazil*	*Bulgaria*	*Chile*	*China*	*Colombia*	*Costa Rica*	*Cuba*	*Denmark*	*Dominican Republic*	*Ecuador*	*etc.*
1. Pecuniary claims for damages when the principle of indemnity is recognized by the parties.....																	
2. Reciprocal free aid to the indigent sick																	
3. International protection of workmen..																	
4. Means of preventing collisions at sea..																	
5. Weights and measures.....																	
6. Measurement of vessels.....																	
7. Wages and estates of deceased seamen																	
8. Protection of literary and artistic works																	
9. Regulation of commercial and industrial companies																	
10. Pecuniary claims arising from acts of war, civil war, the arrest of foreigners or seizure of their property																	
11. Sanitary regulations																	
12. Equality of nationals and foreigners as to taxes and imports.....																	
13. Customs tariffs																	
14. Regulations concerning epizooty, phylloxera and other similar pestilences																	
15. Monetary systems																	
16. Right of foreigners to acquire and hold property																	
17. Civil and commercial procedure.....																	
18. Pecuniary claims involving the interpretation or application of Conventions of every kind between the parties in dispute.....																	
19. Repatriation conventions																	
20. Post, telegraph and telephone conventions																	
21. Taxes against vessels, dock charges, lighthouse and pilot dues, salvage charges and taxes imposed in case of damage or shipwreck.....																	
22. Private international law.....																	

[165]

NINTH MEETING

OCTOBER 10, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The program of the day calls for the discussion of the proposition of the Russian delegation, printed and distributed on the preceding evening.[1]

His Excellency Sir **Edward Fry** states that this proposition seems to him to be acceptable to everybody and declares that he is prepared to vote for it.

Mr. **James Brown Scott** declares that the delegation of the United States of American cannot accept the proposition which has been brought up for discussion because it does not contain the two first articles of the Anglo-American project.

The **President** puts the article of this proposition to a vote; it reads as follows:

ARTICLE 17

On account of the great difficulty in determining the extent to which and the conditions under which recourse to obligatory arbitration might be recognized by the unanimous vote of the Powers in a general treaty, the contracting Powers confine themselves to enumerating in an additional act, annexed to the present Convention, such cases as deserve to be taken into consideration in the free opinion of the respective Governments. This additional act shall be binding only upon such Powers as sign it or adhere to it.

Voting for, 31: Argentine Republic, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Greece,[2] Guatemala, Haiti, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, Peru, Persia, Portugal, Russia, Salvador, Serbia, Uruguay, Venezuela.

[166] *Voting against,* 5: Germany, United States of America, Austria-Hungary, Belgium, Roumania.

Abstaining, 8: Italy, Japan, Luxemburg, the Netherlands, Siam, Sweden, Switzerland, Turkey.

His Excellency Mr. **Martens** recalls that the Russian proposition had no other aim than that of securing a unanimous vote. The vote has shown that it failed to secure such unanimity; under these conditions, he declares that he will withdraw the proposition which he presented in the name of the Russian delegation.

The **President** reports that the Commission has only to examine the Austro-

[1] Annex 46.

[2] At the call of its name, the delegation declared that it could cast only a provisional vote while awaiting instructions from its Government.

Hungarian resolution [1] to bring to a close the discussion of the report of Baron GUILLAUME.

His Excellency Mr. **Mérey von Kapos Mére:** Gentlemen: I do not mean at this time to go into a detailed exposition of the Austro-Hungarian proposition, the reasons for which I have already stated at different times in the committee of examination and in the Commission. In view of the fact that the minutes of these meetings have been distributed, our colleagues are able to find there all the explanations that I was able to furnish.

I confine myself, therefore, to stating two things.

1. The Austro-Hungarian resolution is based upon two considerations: that of the unanimous recognition of the principle of obligatory arbitration and that of the practical application of this principle to certain definite matters.

2. Whilst many of our colleagues were thinking of the possibility of the immediate conclusion of a definitive arrangement, a certain number of our colleagues and myself were of opinion that this eventuality was not possible and that it would be necessary to subject the question to a previous study by our Governments, a fact which is expressed in the second part of the resolution.

It seems to me, however, that at this time we are dealing no longer with a juridical matter, but rather with a question of direct present import, that is to say, how to get out of the blind alley in which we find ourselves.

Up to the present time both the discussion and our voting have borne upon the Anglo-American proposition. As it had, within the committee of examination, secured more votes than the Austro-Hungarian proposition, it was quite natural that it should first be passed on to the Commission and that the Austro-Hungarian resolution should yield precedence to it.

But, in the meeting of Monday last, the Anglo-American proposition secured only a large majority. Therefore, as unanimity or near unanimity is necessary to all the projects that are passed from the Commission to the Conference, the proposition in question was not given the wished for chance and it can no longer be considered.

I draw your attention to still another matter. At the close of the meeting of Monday last we discussed and adopted the revised text of the Conference of 1899. It was, so to speak, a third reading of that Convention. This entire Convention together with the improvements and amplifications that we have given to it has been submitted to a vote and accepted unanimously. This, to my mind, constitutes an accomplished fact, that is to say, the whole subject has been unanimously adopted, from one end to the other, from Article 1 to Article [167] 94! For that very reason there is no longer any possibility of taking up this vote again and introducing into the Convention one or several new articles. In consequence, any proposition to that end must be excluded.

Therefore, I have reached the following conclusion: To my mind, but two alternatives are left. The first would be that we separate without having come to an understanding with regard to obligatory arbitration. This eventuality—which I would not commend to my colleagues—I do not believe would be fatal. We have not wasted our time; we have given it to serious studies and our discussions will remain precious for future labors. Are there no other questions, equally important, upon which we have not been able to come to an agreement? The *vœu,* relative to the establishment of a court of arbitral justice which we

[1] Annex 45

shall vote on in short order proves that we have not come to an agreement upon this question. And in many military questions in the matter of the placing of mines, for instance, we have not come to an agreement. This leads me to state that in case we should separate without having secured any stipulation whatever, it could not be said that the Conference has not fulfilled its task. Nor is it a matter of indifference to observe that, if obligatory arbitration were really a matter of the first importance, it ought to have been referred to in the Russian program.

The second alternative which presents itself again at the present time is that of accepting the Austro-Hungarian proposition. It will suffice to compare these two alternatives to give one's preference to the second. Between a negative result—nothing at all, so to say—and a general agreement upon a formula, choice cannot be difficult. For although the first of these eventualities would in no way imply failure on the part of the First Commission, as I have endeavored to make you realize, it would, nevertheless, make a better impression upon public opinion and would be, therefore, in the interest of the Conference itself if we should pass to this resolution which might be generally acceptable.

What objections have, up to the present time, been presented against the Austro-Hungarian proposition? At first it was characterized as being of a subsidiary nature. This meant that there were other propositions that went farther and gave greater satisfaction to the sentiments of the majority and that it was necessary to see if they were not going to secure unanimity. In consequence, our proposition was only conditional. But the hypothesis to which it was subordinated has now become a reality. The moment has now come when those of my colleagues who, like the first delegates of Italy, the United States, Brazil, Argentina, Mexico, the Netherlands and Serbia, in the committee of examination, gave their provisional approval, shall now give their definitive adhesion.

Another objection that was raised was that the resolution was too anodyne in nature, that it was but a recommendation. I do not feel convinced that that view is correct. The First and the Second Peace Conferences have accepted several *vœux* and resolutions differing materially from the Austro-Hungarian resolution. In comparing them with the latter it will be found that whilst the other wishes do not represent an obligation, this resolution does establish an obligation, not only morally but in express terms. Those who should sign it would have to notify the Netherland Government, within a period which is still to be determined, of those matters that they are ready to submit to obligatory arbitration.

Let us now pass on to a third objection that has been made against the Austro-Hungarian resolution. It has been said that it does not create the *juris vinculum*. This reproach was justified at the time when the proposition establishing this *juris vinculum* could be accepted. But this looked-for end not having been realized, I do regard it as an advantage of the resolution that it does not establish this *juris vinculum* and that, in consequence, it may be accepted by everyone.

[168] In summarizing what I have just said, I find that there is no longer any objection against the gist, against the essence of the Austro-Hungarian proposition. It takes all points of view into account; it satisfies everyone and it may be accepted by all. Some who are the most enthusiastic partisans of obligatory arbitration, will notify to the Netherland Government a list that is

longer; the rest, more skeptical, will content themselves with stating only a few matters.

I now return to the matter of direct present import. We find ourselves in a very advanced stage of our labors; we are at the close of the Conference. We will have to ask ourselves this question: is it practical, is it useful to continue our discussion indefinitely? Would it not be preferable to terminate our work with an act of unanimity instead of holding up to public opinion a disagreement as the last phase of the Conference. I appeal therefore to your good-will, to that spirit of understanding and of conciliation which has so many times been in evidence. If anyone still has scruples with regard to the Austro-Hungarian proposition, well now, let him put them away with one final sweep, let him, if necessary, perform a small act of abnegation, even a small sacrifice of the intellect, so that the last question to be solved by the Conference may be solved with a unanimous vote.

His Excellency Sir **Edward Fry**: His Excellency Mr. MÉREY VON KAPOS-MÉRE has just given expression to the hope that his proposition may give satisfaction to everyone. As for myself, I declare that I cannot accept it.

We have recently voted the Anglo-American project by a very large majority. Mr. MÉREY's proposition to-day is to deprive us of all the results of this vote, to eliminate the list and to remit to further consideration the question of obligatory arbitration.

I believe if we vote the resolution of Mr. MÉREY to-day we shall contradict ourselves.

The vote of the Anglo-American project shows that there are nations which believe that they have sufficiently studied the question in order to conclude at the present moment a general treaty. Why remit them to further study? (*Applause.*)

His Excellency Mr. **Choate** makes the following address in English:[1]

I did not expect, Mr. President, to have had to trouble the Commission again, or to occupy any moments of its time. In view, however, of the startling proposition developed by the first delegate of Austria-Hungary, I cannot refrain from entering my earnest protest.

After having discussed for three months the subject which occupies our attention to-day, the Commission has expressed its will by an overwhelming majority of thirty-one votes against five or eight—a majority of four or more to one—and has thereby declared emphatically in favor of obligatory arbitration. It has voted upon an entire series of articles, separately and all together, and the same majority has stood stedfastly by its decision. The minority has been so feeble that one could almost count its number upon the fingers of a single hand, and now it is proposed to annul everything that we have done in the last three months, and it is said by the distinguished first delegate of Austria that there is no alternative—that either we must accept the rule of absolute unanimity, or the proposition which he has presented, which is absolutely contrary to the clearly manifested will of the Commission, and is a fearful step backward from the point so strongly expressed by that same will.

What conclusion would have to be drawn if we should accept the proposition of Mr. MÉREY? Why, that a single member of the Conference can [169] prevent it from doing anything, and can nullify that which all the rest

[1] See footnote, *post*, p. 190.

have succeeded in doing up to the present time. Even if it were possible to find reasons on which one could base a conclusion so cruel, it would not be for the Commission to decide the question. The last word would not belong to it. Our duty as a Commission is to follow out our deliberations to the end, and if our decisions have been taken by an absolute majority, we must submit them to the Conference. There lies the duty with which we are charged. It is not for us, the Commission, to dictate to the Conference or to decide what it only can decide. Assuming, then, that there were grounds for the very destructive proposition which the first delegate of Austria has laid down, I insist that it is not a question within the competence of the Commission at all, but solely for the Conference itself in plenary session.

As to the merits of the proposition, can it possibly stand? Can five votes nullify the will of the thirty-one? That is not possible. Such a proposition cannot be sustained. By this decisive vote we have accepted the principle that we would submit to obligatory arbitration cases of a juridical order, and especially those arising upon the interpretation of treaties. We have agreed, also, that the treaty should not apply in cases where national honor or the vital interests of either party were involved, and that each Power should have itself the right to determine for itself whether such was the case. We have further voted a list of cases in which arbitration should be obligatory, waiving the honor clause, and finally we have agreed to the protocol proposed by the delegation of Great Britain, which would enable subsequent subjects to be added to the list. There only remain some details for us to determine.

Now, behold, Mr. MÉREY comes forward with his proposition, which is directly contrary to all this, which nullifies it all, which undoes all that we have been doing since we first took up the project for consideration; and we are told that we must accept his proposition or nothing. He would have us remit to the Powers for further study a proposition on which we are all agreed. Surely we have not come here for any such trivial purpose. We have come at the behest of our Governments and the general call of the nations, to establish obligatory arbitration. It has not been our purpose to labor during three months to accomplish that end, and to annul it all at last at the suggestion of five dissenting Powers, and destroy at one blow the result of all our work. And will the Governments succeed any better than we? Will they succeed as well as we? Have we not reached that approximate unanimity which justifies the carriage of this proposition one step further, its submission to the final decision of the Conference? In the Third Commission that experienced diplomatist, Count TORNIELLI, decided over and over again that all that was necessary to carry the proposition to the Conference was that it should receive in the Commission an absolute majority, that is to say, a majority of all the nations constituting the Conference. At any rate, I so understood him.

It is for the Conference alone to determine whether it will accept it with unanimity or with that approximate unanimity which we claim to be sufficient, and whether it shall find a place in the Final Act. It is absolutely impossible for this Commission to determine any such question. Let us be faithful to our duty and hold on to that advanced ground which we have attained thus far.

If there is any question to be solved, let us submit it to the Conference to
[170] which it belongs. Assuredly, I pay all respect to the minority, but I have no doubt of the rights of the majority. I mean such a majority as has es-

tablished this proposition—the proposition of an obligatory agreement into which those of the nations may enter who desire to do so, and the rest may abstain until each desires to come in. You will search in vain the records of the First Conference and of this Conference, and the correspondence that preceded both, for any assertion of this fatal claim of the necessity of absolute unanimity in order to secure for any act or convention a place in the Final Act of the Conference. And the proof on the records is clear to the contrary. Such a rule would paralyze the will and the action of the Conference at the behest of one Power, even the smallest, and even though it should dissent for the mere purpose of destroying the unanimity. Seeing this, the advocates of this monstrous proposition take various shifting grounds.

It is said, on the one part, in answer to the clear proofs, that such unanimity has not been in all cases required, that the rule of absolute unanimity "generally" holds. But in saying "generally" you abandon the whole position, for who but the Conference is to determine when the exceptions arise, and whether the given case comes within the "general" recognition?

On the other hand, it is said that the vote must be unanimous or "nearly so." And this again is a clear and total abandonment of the position, for who but the Conference is to determine what is the meaning of "nearly so." It has no meaning, and certainly our vote of four to one on obligatory arbitration is in any sense "nearly so."

And again it is said that the rule of absolute unanimity is maintained unless the dissentients be few and do not insist upon the proposition so carried by a great majority being included in the Final Act of the Conference as a part of its work. This suggestion also is a complete abandonment of the preposterous claim.

Clearly, this Commission has no right or power whatever to meddle with the question. Its work, as I have said before—including this proposition of ours which has been carried by such a great majority—must go to the Conference, and it is for the Conference alone, in case unanimity has not been reached, to determine whether it shall go into the Final Act.

His Excellency Mr. **Mérey von Kapos-Mére:** I should have much desired not to take part in the discussion of the point which has been preoccupying us for a long time, for nearly two months. But the discourses of their Excellencies, the first delegate of Great Britain and the first delegate of the United States compel me to it. I take the liberty of commending what I have to say to the special attention of the President of the Commission and to that of the President of the Conference.

It is a fact that more and more as the days go by I am wondering if we are here present at an international conference or in a parliament. Such confusion, gentlemen, would to my mind be most regrettable. The situation as it has presented itself for the last two months in the First Commission, would be quite normal and quite natural in a parliament. In a parliament there is a majority and a minority. It is the majority that affirms its will, that decides; the minority avails itself of the right to oppose and to criticize. As I have said, for a parliament this struggle is a normal situation, a situation presenting itself every day. But the situation is quite different in an international conference. I almost fear that I will use a commonplace in expressing to you what is—in my opinion—the *a b c* of any international meeting.

[171] The principle always observed in such an assembly was and still is, if you will permit me to express it in a few words: all that is unanimously accepted, stays, and all that is not accepted by everyone, disappears. It is a commonplace, I quite agree, but I also realize that in this Commission the members seem materially to depart from this primordial principle. There is no majority and there is no minority in an international assembly, and that is why it would not be exact to say that a very large majority has been forced to give up a project because a minority was opposed to it.

Such is the situation, and I do not see how there can be the slightest doubt that a proposition, voted by a majority of thirty-one against nine—could under any circumstances be passed on by the Commission to the Conference. It is this that I wished to say.

His Excellency Mr. **Nelidow** without going into the details of the discussion, desires to consider one point in the discourse of Mr. CHOATE.

Mr. MÉREY is right in affirming that the first principle of any conference is that of unanimity; it is not an ideal form but the very basis of political understanding.

In the parliaments the majority may force its will upon the minority, because the deputies represent each one and the same nation, but here each delegation represents a different State, equally sovereign, and has no right to accept a decision of the majority contrary to the will of its Government. (*Applause.*)

His Excellency Mr. **Choate:** The eminent President of the Conference has stated that my proposition tended to impose the will of the majority upon the minority. This, gentlemen, is an evident misunderstanding. I have in no way expressed myself to that end. What I mean to say is that when a large majority of the Conference desires to conclude an agreement with regard to obligatory arbitration, an agreement in which those who may wish to do so are to take part, and an agreement that leaves it free to the rest to abstain if it seems best to them, it has the right to do so and to do so under what Mr. MARTENS has so well designated as the "flag of the Conference." Whilst the contrary proposition which Mr. MÉREY and others have defended does not merely subject a large majority, but the entire body of the Conference minus one member, to the dominating and destructive will of this solitary member. Certainly, there is neither justice nor reason, nor good sense in a proposition leading to such an iniquitous result, which would make it absolutely impossible for us to reach something near decisive with regard to a matter of some slight importance.

His Excellency Mr. **Nelidow:** I have desired to say that the resolution taken by the majority is not binding upon the minority and cannot be regarded as a resolution of the Conference itself; without our being unanimous, we can only refer to decisions taken in the Conference.

His Excellency Mr. **van den Heuvel:** All of us have come to The Hague animated by two sentiments, desirous of marching together hand in hand, to come to a unanimous understanding and desirous also of contributing toward the work of humanization, to the stability of peace and to the progress of arbitration.

Unanimous agreement is the rule prevailing in diplomatic conferences. The delegates of autonomous sovereignties deliberate in the fullness of their freedom and under the conditions of perfect equality; it is their aim to define the common ground on which their varying views may meet, and as well their collective desire to improve the situation of the peoples.

[172] Let us not here speak of a crushing majority or of an obstructionist minority. We have not met here to take count of ourselves, but to come to an understanding. By starting from another point of view, would we not disown and abandon the very principle of the Peace Conference? Should it not then be feared that irreducible groups will be found. So soon as a more or less large majority should gain confidence in its stability, the spirit of concession would be shaken and we would be exposed to the danger of seeing it vanish.

But, gentlemen, let us not forget this: on the one hand, the majority may not pretend here to bind the minority and, on the other hand, it is only by our becoming united in a voluntary and reasoned adhesion to the same resolutions that we shall give to these their strength and assure to them a universal consideration.

To facilitate and to extend arbitration, that was one of the principal aims of our efforts.

The first part of the task has been met. Unanimously we have voted for the revision of the Convention relative to the pacific settlement of international disputes. And many are the improvements that we have introduced into the provisions that deal with the international commissions of inquiry, with the organization and the procedure of arbitration. This is one of the great tools of peace which we have materially perfected.

There now remains the second part of the task, the extension of arbitration. All of us have immediately agreed to proclaim the incontestable utility of the ever more frequent admission of the compromissary arbitration clause; but divergencies arose when the time came to adopt a practical plan. Some of us stated that it was proper to extend obligatory arbitration, not by means of a world treaty, but by special treaties; others declared that obligatory arbitration would be generally accepted only if it were accompanied by essential reservations. Our committee of examination has sought to find a solution for these two divergencies; with difficulty and after many days of discussion it has drawn up the rather modest list which the majority has adopted, and it is this list which has now become a new obstacle. We have seen our good-will brought to a halt by this nomenclature, or rather by the principle which it expresses. But in truth, the difficulties have not been removed and all of us have clung to our respective attitudes.

The honorable Mr. MARTENS has presented a plan of conciliation; I pay tribute to the thought of union that inspired it; but I realize that it was unable to secure its object. Now another conciliatory proposition is submitted to your approval; it is the *vœu* presented by the first delegate of Austria-Hungary. What reception are you going to accord it?

This *vœu* does not completely meet our personal views. Nevertheless, and in a spirit of compromise, I come to ask you to give it your approval. It is not fundamentally contrary to the sentiment of any particular group. But it attests, and therein lies its importance, our will to extend obligatory arbitration in practice, and it binds our respective Governments to submit to a new examination the question as to whether or not we can draft a list of matters for which arbitration without reservation might also be admitted in a universal or world treaty.

This does not mean an indefinite postponement; the *vœu* will fix a day.

Gentlemen, let all of us accept this conciliatory proposition which demands of some of us the temporary adjournment of our desires, and of others to

see if we might not, at least in certain matters, depart from our general principles.

His Excellency Mr. **Choate**: It has been said that unanimity was the rule of the former Conference and should be the rule of this, but I deny the assertion altogether. This claim, whoever makes it, is not founded in fact. Twice the
[173] Conference of 1899 acted on the opposite theory and repudiated this suggestion of absolute unanimity being necessary, and more recently—only last week—in this very Conference the proposition was ignored and denied.

In the Conference of 1899 the decisions of the Conference on two important subjects were taken and carried into the Final Act not only against the dissent but against the earnest protest of two great Powers, if Great Britain and the United States of America are entitled to be so called—I mean the propositions relative to the use of asphyxiating gas and the dumdum bullets. According to the theory which has here been developed, these decisions ought not to have become a part of the law of the world, as they did become, by the act of the First Conference; there being the dissent of two great Powers, they should have been thrown out, as it is proposed to throw out our great majority on the subject of obligatory arbitration.

But here, in this present Conference, is another equally strong proof of the baseless character of the present contention. It is but a few days ago that we voted for the international court of prize. It has been accepted. It is to be incorporated in the Final Act as, in the opinion of many, the most important and valuable work of the Conference; but there was one clear vote declared against it, that of Brazil. And yet nobody claimed that the rule of absolute unanimity should apply to the case. That is the established act and decision of this very Conference. The first delegate of Brazil was too magnanimous to offer any objection, based upon his negative vote, to its becoming the decision of the Conference. He was generous enough to say that the accord would hold good in spite of his dissent.

Let us then, gentlemen, put to the vote of this Conference the proposition of the honorable delegate of Austria-Hungary, and let us see whether those who thus far have constituted this great majority, on the one hand, wish to support their own action, or, on the other, to accept the remarkable proposition of Mr. MÉREY, which utterly nullifies it. Let us occupy ourselves with that which is our business and leave to the Conference the duty of giving an answer to the question which has here been raised. (*Applause.*)

His Excellency Mr. **Nelidow**: I concur entirely in the wish of Mr. CHOATE that we should cease to discuss and that we should now vote upon the proposition of Mr. MÉREY.

Mr. CHOATE has referred to the precedents of 1899. It is necessary to reply thereto by stating that at the time purely technical questions were being considered and not conventions.

As regards the prize court, there is but one vote cast against the project, and the delegation casting that vote did not object to having the project appear in the Final Act. It may, therefore, be affirmed that even in this hypothesis moral unanimity was not lacking.

Mr. **de Beaufort**: Within the committee of examination, the delegation of the Netherlands explained the reasons for its adhesion to the proposition of his Excellency Mr. MÉREY by the fact that the votes cast against it in the committee

did not permit a hope to secure near unanimity between the Powers with regard to the list to which it had declared itself favorable. After the vote of the First Commission upon the list, the delegation of the Netherlands, to its great regret, can not but realize that its anticipation has been realized and that the list will not receive the assent of a strong and considerable minority.

The same reasons that have led us to vote in favor of the Austro-Hungarian proposition in the committee of examination continue, therefore, to exist
[174] now, and in these conditions we are disposed to give anew our favorable vote to that proposition.

On the one hand, we have the certainty that the special convention for obligatory arbitration which contains the list in whose favor we have voted, will not secure the votes of many States; on the other hand, the Austro-Hungarian proposition has held out to us the eventuality that, after the expiration of a definite lapse of time, the greater number, perhaps all of the States represented at the Conference, will concur in stipulations for obligatory arbitration upon certain matters.

The Netherland delegation feels convinced that in order to have obligatory arbitration definitively incorporated in conventional international law, the general or the nearly general consent is, from the very beginning, of the highest importance; regretting, therefore, that this consent has not been secured, but not losing hope that in the near future a subsequent agreement may be reached, it believes that it will act in favor of the principle of obligatory arbitration by giving its favorable vote to the proposition of Mr. MÉREY.

His Excellency Mr. **Mérey von Kapos-Mére**: I desire to reply in only a few words to the last speech of Mr. CHOATE. It seems to me that his Excellency has resorted to an argument that is generally availed of when there is no better one within reach.

It was an *ad absurdum* demonstration.

Mr. CHOATE has called our attention to the fact that certain decisions have not secured the necessary unanimity. He has even insisted upon the fact that at the time when the vote was cast for the convention dealing with the prize court there was a contrary vote. It is evident that conventions now and then contain stipulations that cannot secure unanimous agreement. But these are special provisions as, for instance, Article 44 of the regulation concerning the laws and usages of warfare on land; they are questions of detail that do not stand in the way of acceptance of the totality of the stipulation in question.

This brings me to rectify, to some extent, the arithmetic of Mr. CHOATE. He always refers to some States that are opposed to the project voted by the majority; he speaks of a minority, if I may use this word. It is along this line of thought and in order that this arithmetic may not influence the minds of some of our colleagues that I now say: Let's see about this minority and rectify somewhat the arithmetic of Mr. CHOATE. Now there were thirty-one votes cast in favor of the Anglo-American project, with nine contrary votes and four abstentions. Let's draw the conclusion of this vote. It proves, in the first place, that thirteen Powers, one-third of the delegations represented at this Conference, have not accepted the Anglo-American proposition. Let's next look at the favorable vote cast by Russia. We see that it was accompanied by two reservations which, not having been realized, now give me the right to interpret this vote as

a negative vote. So this gives us fourteen votes against and thirty for the proposition.

Let's see now if there are any great Powers among those that have not accepted the Anglo-American proposition. I will call them to your attention in alphabetical order: Germany, Austria-Hungary, Italy, Japan, Russia and Turkey.

Thus, gentlemen, and I strongly emphasize the fact, even without the numeral ratio, the famous minority is not a negligible quantity.

His Excellency Mr. **Carlin**: From the very beginning of our discussions concerning obligatory arbitration, the Swiss delegation has presented intermediate propositions, tending to conciliate the various opinions before us and to secure, if possible, a unanimous vote. It has continued its efforts in this sense to the very last moment.

The Swiss propositions went farther towards meeting the desires of the majority than the Austro-Hungarian project of a resolution. Therefore, the Swiss delegation, in the committee of examination, abstained from casting [175] a vote upon this subject. To-day, it would not ask for anything better than to second it, if it were accepted by a unanimous vote of the States. If this were not to come about, it would abstain.

His Excellency Baron **Marschall von Bieberstein** concurs in the view expressed by the President of the Conference and by the first delegate of Austria-Hungary. Conforming with the usages that have always been accepted in international conferences, his Government could not accept the principle enunciated by the first delegate of the United States of America to the effect that the majority decides and that the minority must submit.

I believe that this principle would endanger all international conferences.

His Excellency Mr. **Ruy Barbosa** states that, in view of the fact that he has been referred to as not having insisted, in spite of his negative vote, that the international prize court might be instituted, he believes it to be his duty to explain himself.

He adds that he will abstain from voting upon the Austro-Hungarian resolution.

His Excellency Mr. **Milovan Milovanovitch** recalls that the Serbian delegation, as is proved by its anterior votes, has given its broadest adhesion to the principle of obligatory arbitration, and shown itself ready to accept its immediate application to all non-political controversies and even to those of a political character. If it votes now in favor of the proposition of Mr. MÉREY, it is for those same reasons and with the same object as have just been expressed by his Excellency the first delegate of the Netherlands.

His Excellency Mr. **Martens** asks to be permitted to make a rectification of a passage in the last discourse of his Excellency Mr. MÉREY. It is true that the Russian delegation has voted the Anglo-American project with two reservations. But, in the mind of the delegation, these reservations related to the final issue of the discussion upon arbitration and were in no way to be regarded as giving even now a negative character to its vote. We could not, therefore, as was done by his Excellency Mr. MÉREY, rank Russia with the Powers hostile to the immediate conclusion of a general arbitration treaty.

His Excellency Mr. **Luis M. Drago** wishes to explain his vote upon the Austro-Hungarian proposition. Within the committee he had given to it an affirmative vote, in its character of a subsidiary proposition. But in the presence

of the vote upon the Anglo-American project, accepted by thirty-one out of forty-four votes, the delegation of the Argentine Republic is of opinion that it could not maintain its favorable vote without contradicting itself.

The Austro-Hungarian resolution is put to a vote: the proposition is defeated by twenty-four votes against fourteen, with six abstentions.

Voting for, 14: Germany, Austria-Hungary, Belgium, Bulgaria, Denmark, Greece, Italy, Luxemburg, Montenegro, the Netherlands, Roumania, Russia, Serbia, Turkey.

Voting against, 24: United States of America, Argentine Republic, Bolivia, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Persia, Portugal, Salvador, Siam, Uruguay, Venezuela.

Abstaining, 6: Brazil, China, Japan, Norway, Sweden, Switzerland.

[176] His Excellency Count **Tornielli**: In the first part of September I had the honor to ask in committee A that a proposition presented by the Italian delegation upon the subject of obligatory arbitration should be postponed until the time when the Commission should have passed upon all the other propositions which might be presented.

The result of the last ballots convinces me that it would be an indiscretion to continue further the search for formulæ which could have no chance of reuniting the votes. Under these conditions I abandon the proposition which I had the honor to introduce.

I am convinced that after the intensive work of judicial analysis and profound criticism of the texts which has permitted us to improve and complete very seriously and to a large extent the work of the peaceful settlement of international disputes, our spirits are no longer prepared to renounce the objections which every new formula must meet.

It is not the time for great speeches.

There are, however, certain necessary statements.

I shall sum them up in three points.

The first—the most important—is that the Conference of 1907 has been unanimous in recognizing the principle of obligatory arbitration.

The second consists in affirming, without fear of contradiction, that in the great field of international relations forming the subject of the law of conventions between States, there are some without doubt which may be the subject of obligatory arbitration.

The third statement for which I invoke your unanimous consent, is this: All the States in the world have worked here together for four months upon difficult, sometimes delicate, questions, learning not only to know one another better, but also to respect and love one another more.

The general spirit which has come from the contact of all these forces working together is a very high one. It is a commanding spectacle and an undeniable result. The differences of opinion between us have never passed the limit of judicial controversies and questions of detail.

Let us wisely stop there. We have run a good course. Let us be content with the work accomplished. Give it time to bring forth fruit.

If looking behind us, some of us feel regret at seeing certain works uncompleted, on turning our eyes to the future, we are all filled with confidence, and no thought of discouragement invades our souls.

His Excellency Baron **Marschall von Bieberstein** expresses his hearty thanks to Count TORNIELLI for the noble words that he has pronounced and declares that he gladly accepts the three statements that he has just enunciated.

His Excellency Mr. **Mérey von Kapos-Mére** concurs in the words of the first delegate of Italy and subscribes all the more readily to his statements because the first two are precisely those by which his resolution was prompted.

The **President:** I associate myself entirely with the noble words that Count TORNIELLI has just expressed.

[177] They afford me the opportunity to affirm anew the points upon which an agreement has been reached and which I had already set forth in the meeting of October 5:

1. The principle of obligatory arbitration, which could not carry the day in 1899, has received unanimous consecration by the assembly of 1907.

2. It has been agreed by all that certain matters, especially those that relate to the interpretation of treaties, are susceptible of unreserved submission to obligatory arbitration.

3. Those who seem to entertain different judgment concerning the time of the engagement with regard to the one or the other of these matters, are separated from each other only by a matter of *time* and in no way by a question of principle.

I had tried to set forth all these points in the name of the First Commission, and it is also in its name that I thank Count TORNIELLI for having confirmed them.

The agreement upon the last point that he has referred to exists likewise and is not the less important. It is of great interest to realize that, however much warmth may have been shown in the discussions, only considerations of a juridical nature have been referred to therein.

It is, therefore, necessary that away from here these points of agreement should be clearly realized and that we should not part from here without having affirmed them by an expression of unanimous agreement. It must be known that the cause of obligatory arbitration issues victorious and not defeated from the Second Peace Conference.

In what form are we to make that clear? It is a matter for which we must find a formula. As for myself, if the Commission is of that opinion, I place myself at its disposal to cooperate with some representatives of each opinion for the drafting of a text which shall express best in the eyes of the world our common feeling. (*Prolonged applause.*)

His Excellency Mr. **Nelidow** proposes the constitution of a very small committee the members of which should be chosen from among the representatives of the two opinions that divide the Commission, and which should be charged with finding a formula acceptable to everyone.

His Excellency Count **Tornielli** proposes that it be left with the President of the Conference and with Mr. LÉON BOURGEOIS to constitute the drafting committee that has just been proposed. (*Approval.*)

The Commission passes on to the examination of the project concerning the court of arbitral justice.[1]

After an exchange of views in which take part his Excellency Mr. **Martens,** Mr. **James Brown Scott,** his Excellency Mr. **Beldiman,** Mr. **Eyre Crowe** and

[1] Annexes 80, 84, 85 and 86.

his Excellency Sir **Edward Fry,** it is decided to read the articles, one by one, to enable the delegates to present their remarks upon matters of detail.

ARTICLE 1

With a view to promoting the cause of arbitration, the signatory Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of insuring continuity in arbitral jurisprudence.

[178] His Excellency Mr. **Beldiman:** Toward the end of the meeting of last evening, I had fully concurred in the declarations which my colleagues from Switzerland, Belgium and Denmark had made with regard to the project relative to the creation of a Court of Arbitral Justice, and, in view of the lateness of the hour, I had reserved for myself the privilege of explaining to-day the considerations which prevented my Government from voting in favor of the *vœu* which is now recommended to us.

The report of Mr. SCOTT ends with this sentence:

> Our aim has been not merely to build the beautiful façade for the palace of international justice; we have erected, indeed furnished the structure, so that the judges have only to take their places upon the bench.

This comparison taken from architecture suggests the remark that one of the primordial conditions of any edifice, large or small, is its foundation.

What would one say of an architect who had presented the plans for a beautiful palace, without the slightest foresight regarding its foundations, which are, nevertheless, indispensable in order that the projected edifice might stand?

For want of these foundations the architect presents a *vœu,* and he rests the great project of a court of arbitral justice upon a *"pium desiratum"* for the future.

What is the origin of the *vœu* proposed to us? It is the absolute impossibility of finding a solution for *the capital and vital point* of the project, that of the composition of the new permanent Court of Arbitral Justice, the creation of which we are asked to recommend to our Governments. These are not my own expressions. Several times, and the last time in a remarkable discourse pronounced on September 5 within the committee of examination, his Excellency the ambassador of the United States declared—and this was perfectly just—that the composition of the international court of justice—the designation and the distribution of judgeships—were the *capital and vital point* of the entire project.

From August 1 onward, that is to say, for nearly two months and a half, an immense effort has been made to find a possible and acceptable solution, and since the report is silent regarding the most important of the discussions of the committee of examination—and let me say this silence is absolutely inexplicable—I find myself compelled, through my duty of justifying the vote of my Government, to remind you succinctly of the history of this decisive part.

I cannot do it better than through the very words of his Excellency the President of the Conference, who in the meeting of the committee of September 18 gave an account of the discussions that had taken place within the subcommittee especially organized to reach at last a solution for the capital and vital question of the entire project.

You will remember that between September 7 and 18, this subcommittee,

composed of their Excellencies the President of the Conference, Messrs. Bourgeois, Choate, Baron Marschall, Barbosa, Mérey, Count Tornielli, and Sir Edward Fry, had made a last effort to give a real basis to the project. What was the result of this supreme effort?

The following are the words in which his Excellency Mr. Nelidow expressed himself:

> The Anglo-Germano-American project has not been supported and the rotation system has been defeated. In the next place, the committee examined a system of election according to which the members of the Court of 1899 should choose from among themselves fifteen to seventeen judges to constitute the new tribunal.
>
> This manner of composing the court has likewise met with opposition. It was objected that all the members of the Court of 1899 were not jurists and could not offer sufficient guarantees.
>
> [179] The subcommittee then attempted to combine the two principles of the nomination and of the election. Each Government should nominate four candidates; the list thus established would be submitted to the members of the present court who would choose therefrom. This combination was likewise put aside for the reason that it was found too complicated, and it was thought that the States should be left free to designate, in fact, the members of the new court.
>
> In view of the impossibility of reaching an agreement the subcommittee has decided to refer the matter to the committee of examination B.

Such is the authentic origin of the wish that has been proposed to us.

This *vœu,* gentlemen, is therefore, rather a *confession!*

It is a confession of the absolute impossibility, let me repeat it, of finding any foundations whatever for an artificial construction, planned *a priori,* without a thought of its necessity, nor of its practical utility, nor of the reality of the elements of which the problem was composed. They have not even dared to face within the Commission a discussion of the various solutions that had been suggested; they dared not do it because they were certain that they had no chance of being adopted. And it is only by carefully avoiding to bring before the Commission the *"capital and vital point"* that they have succeeded in continuing this semblance of a project before us.

As for the *vœu* itself, no one has better appreciated its importance and real scope than the author of the proposition submitted on August 1, his Excellency the ambassador and first plenipotentiary of the United States.

This is the way in which his Excellency Mr. Choate qualified the *vœu* in the meeting of the committee of September 5:

> It has also been suggested that the difficulty should be regarded as *insuperable* in the present Conference, and avoided, or rather evaded, by securing *a unanimous vote for the establishment of the court upon the constitution* now under consideration, and leaving it to the Powers or to the next conference *to establish,* if possible, a mode of electing the judges that would satisfy all the Powers.
>
> As I have said, the adoption of this plan would be perhaps an advance upon anything that has heretofore been accomplished. But it would be surely *a serious failure,* and should not be resorted to with any false illusions, as it might *practically* result *in the burial* of the project for the Permanent Court altogether.

I do not know if by these words the illustrious orator meant to identify the check experienced by the project relative to the Court of Arbitral Justice with

the entire work of the Second Conference. Voices more authoritative than mine have arisen against such reproach, especially that of our distinguished president, the ambassador of Russia, who in the meeting of the committee of examination of September 18, expressed himself upon this matter as follows:

> The Conference may disband without having instituted the Court of Arbitral Justice and without incurring, for that reason, the reproach of having disappointed the hopes reposed in it, for the reason that the question was not included in the program.
>
> On the other hand, it is well to remark that if this program did not foresee expressly the institution of the Court, it did not either exclude it, for it refers to the improvements to be wrought into the Convention of 1899.
>
> It may, therefore, be asked whether the committee has found a means to improve the Court of 1899. Mr. NELIDOW does not believe that it has. He cannot associate himself with the proposition of Mr. CHOATE to *accomplish something.* We must do *something good, or nothing at all.*

To be sure we cannot tie up the entire work of the Second Conference with the ephemeral fate of the project of the permanent Court of Arbitral Jus-
[180] tice. Under this express reservation, I am absolutely in agreement with the opinion of the ambassador of the United States who has qualified the adoption of the *vœu* with *"serious failure,"* and *"burial of the project for the Permanent Court."*

As for myself I should probably have been a little more prudent in the choice of expressions. But, since failure has been referred to, this *vœu* resembles the situation of a joint-stock company which has met with discomfiture, whose shareholders, on the day of the collapse should express the *vœu* that there might be someone willing to refund to them the amounts they had lost.

I close by reiterating my declaration that the royal Government which I have the honor to represent, could not concur in a *vœu* proposed in such circumstances, the less so because it believes that the efforts made during more than two months by the most distinguished personalities at the Conference to provide a real basis for this project, have disclosed nothing but the impossibility of realizing those efforts.

To continue the metaphor employed by Mr. CHOATE: This *vœu* cannot resuscitate the project that has been buried!

Mr. **Corragioni d'Orelli:** The Siamese delegation, faithful to the attitude it has taken from the beginning of this discussion and desiring to give fresh proof of its sympathy in favor of the principle of arbitration, will vote for the *vœu* that is presented to us, not doubting that the Governments will within a not too long period of time succeed in agreeing upon a selection of the judges and upon the constitution of the court, based upon the equality of the States.

His Excellency Mr. **Augusto Matte:** The Chilean delegation has had the honor of supporting in the general discussion, consideration of the project presented by the delegation of the United States of America for the creation of a permanent court of arbitration, and in thus acting, it has had in view the noble desire to aid in completing the international organism created by the Convention of 1899 and which the present Conference has developed with the aim of perfecting the judicial power upon which it devolves to settle the disagreements that might arise between the nations, and of applying the provisions of an international codification.

But in order that the tribunal which we are thinking of creating may meet the ends of its institution, it is necessary that it be so organized as to enjoy the absolute confidence of all the States that are going to contribute to its creation, reproducing to a certain extent the very representation that each possesses in the discussions of the Conference.

And the reason for this is most logical. Why, if each State votes in the Conference as a unit for the adoption of all and of each of its resolutions, should it have a different representation in the judicial organization charged with carrying them out? Why, if each nation represents a unit in the legislative power that enacts resolutions and laws, which is accordingly the most fundamental principle of all the powers, why, should not each nation, therefore, have equal representation in the judicial power charged with enforcing them?

When each delegation expresses its thought within this assembly, do we by preference consider its territorial extent, its population, its wealth, or its military power, in order to appreciate its ideas, and disregard the power of its reasoning, the justice which it invokes or the spirit of prudence and conciliation that animated it?

Many, many times, the Conference has given its adhesion to and insured the triumph, by its vote, of propositions solely justified by reason and by the force of justice which they contained, rather than by the power of the nation that supported them!

[181] Why should we act differently when we are dealing with the judicial power which is, after all, but an emanation of this assembly?

The great object that we must pursue in the organization of the Permanent Court of Arbitration is so to establish it as to inspire all with absolute confidence, and the sole means of realizing this object is to accord free and ample representation both to nations powerful and nations weak, in order to thus bring it about that, in the scales of justice, the weight of the right of each should be equal for all alike.

It is a suspicion without the slightest foundation to believe that the small States would not be inspired by the same high motives as the great Powers in designating judges enjoying the highest moral consideration. It would be by far more reasonable and more logical to suppose that the small countries, even more than the great Powers, would take it to heart to choose their judges from amongst the highest authorities of juridical science, for the sole reason that they have but the expedient of opposing their right to the prestige and to the ascendency that human weakness contributes to those that have power and force at their disposal.

When the strong nations begin to distrust the weak nations, why should we wonder if the latter, in their turn, should distrust the former? This is why agreement must be sought and found in mutual confidence.

Moreover, we should not lose sight of the fact that the jurisdiction of the permanent tribunal which we are thinking of creating, is not made binding upon anyone, for the tribunal created by the Convention of 1899 will continue in full activity.

Nor must we lose sight of the fact that even in the provisions of obligatory arbitration as regards only juridical questions in dispute, it has been established that the exceptions of the essential interests, of honor, and of independence would be left intact, leaving to each the exclusive right to invoke them.

If so it is, what danger would there be for anyone in the creation of a

permanent court upon the basis of the equality of all the States, in giving his aid to its formation? Why should it be necessary to sacrifice the fundamental principle of the equality of all the States, a principle upon which rests the Hague Conference, when no one imperils the security of his own interests?

Let us make a loyal and sincere trial of this great principle, and if the result gives full satisfaction, as it is to be hoped, we shall have made a great step forward towards the understanding between all the nations, which alone would suffice for the honor of this Conference.

Before concluding, I have but to say that all that which departs from the basis of the equality of all the States, either in our discussions, or in the creation of the organisms that we mean to establish, would become a sure motive for mutual distrust and mistrust which would seriously compromise the ideal of justice, of concord and of conciliation that all of us pursue within this assembly, where have met all the races and their representatives for the purpose of insuring peace and confidence to mankind.

It is in this sense that we shall give our support to the *vœu* that has been presented to us.

His Excellency Mr. **Nelidow** addresses an appeal to the members of the Commission requesting them to vote the project as it is presented by the committee of examination. The main objections raised by this project were addressed to the provisions dealing with the composition of the court; but these provisions have been discarded.

The rest of the articles have been unanimously voted. The project is perhaps not perfect; but we can, nevertheless, congratulate ourselves for having at least perfected the organization of the future court; it is for our Governments to provide it with judges.

[182] His Excellency Mr. NELIDOW appeals to the good-will of the delegates and asks that the members do not enter into the discussion of all the details of the project. (*Applause.*)

Mr. **Pierre Hudicourt**, delegate from Haiti, speaks as follows:

The delegation from Haiti has the honor to recall to the memory of the members that in a meeting of the subcommission, it has given a favorable vote to the principle of the establishment of a permanent court of arbitral justice. We were not, at that time, dealing with the method of constituting this court.

Now in the convention project annexed to the report of the honorable Mr. SCOTT, Article 1 states:

> with a view to promoting the cause of arbitration, the signatory Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, *based upon the juridical equality of the States* . . . etc.

But, since the distribution of the report and of the convention project, we have received modifications to the text of Articles 1 and 47 of the projected convention. Thus, the phrase "based upon the juridical equality of the States" is left out.

Does not this mean that the constitution of the Court of Arbitral Justice will not be *based upon the juridical equality of the States?*

In the name of the Government of the Republic, I have the honor to reiterate the acceptance of the principle of the institution of a permanent court of arbitral

justice, upon the express and formal condition that the constitution of this court rest on the absolute principle of the juridical equality of the States.

I ask that special record be entered of this statement.

Mr. **James Brown Scott** replies by stating that as the result of a typographical error, the phrase referring to the equality of the States, to which Mr. HUDICOURT has alluded, was included in the first proof of his report. But after having studied the minutes and realizing that the words referred to were not contained therein, he asked that they be omitted from the text.

Mr. **Pierre Hudicourt** states that the delegation from Haiti will give its approval to the project, on the condition that the constitution of the court be based upon the principle of juridical equality.

Mr. **José Gil Fortoul** declares that the Venezuelan delegation will take part in the discussions only if the principle of the equality of the States is previously recognized.

Mr. **Francisco Henriquez i Carvajal** makes an identical statement.

His Excellency Mr. **Cléon Rizo Rangabé** states that he will abstain from taking part in the discussion and that he is unable to vote in favor either of the project or of the *vœu* relative thereto; the gaps in some of the most important questions contained in the project are of such a nature as to exclude their exact interpretation and appreciation

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are named by the signatory Powers that choose them, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

[183] His Excellency Mr. **Hammarskjöld** believes that according to the ideas of its authors, the project must leave absolutely intact the question of the method by which the judges shall be designated. Nevertheless, certain expressions that are found in Article 2 seem to be contrary to this intention.

His Excellency the first delegate of Sweden proposes, therefore, to express paragraph 2 of Article 2 as follows:

> The judges and deputy judges of the Court *shall be* appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

His Excellency Mr. **Hagerup** seconds the proposition of his Excellency Mr. HAMMARSKJÖLD on the strength of the reasons that he has indicated, and also because it seems to him evident that the typographical error that slipped into the report of Mr. SCOTT is susceptible of a regrettable equivocation.

He believes that if we disregard all the provisions tending to the composition of the court, it will be easier for certain delegations to vote the project.

Mr. **James Brown Scott** accepts the modified phraseology proposed by the first delegate of Sweden.

This new phraseology is adopted.

Articles 3 and 4 do not give rise to any remarks.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

ARTICLE 4

The judges of the Court of Arbitral Justice are equal, and rank according to the date on which their appointments were notified [1] and, if they sit by rotation, according to the date of their entry into office.[2] The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

His Excellency Mr. **van den Heuvel** believes that it is more conformable to the principle of equality to demand simply a solemn affirmation.

The phraseology of Article 5 would result in creating two categories of judges—some would be bound by their conscience and by the civil law—others would be bound additionally by their religious convictions.

[184] Mr. **James Brown Scott** replies by saying that the authors of the project have taken this remark into account and have not made oath-taking obligatory.

Mr. **Louis Renault** calls for the retention of the proposed text in order that there may be identity between it and that contained in the project for the prize court.

Mr. **Heinrich Lammasch** also believes that the present text might be retained, the more so because the free choice between solemn affirmation and oath is admitted by the most of the national legislations.

Articles 6 to 35 do not give rise to remarks.

ARTICLE 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant*, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

[1] Article 3, paragraph 1.
[2] See annex to Article 7.

ARTICLE 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

ARTICLE 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a travelling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention of July 29, 1899.

[185]

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation (*Article 6*) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The Secretary General of the International Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June, and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

PART II.—COMPETENCY AND PROCEDURE

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

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ARTICLE 18

The delegation (Article 6) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part . . . of the Convention of July 29, 1899, is to be applied.

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the delegation is entrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute should be the subject of an arbitration either of the Court or of the delegation itself.

ARTICLE 19

The delegation is also competent to settle the *compromis*[1] if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants*, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way;

2. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

[1] Article 31 of the Convention of July 29, 1899.

ARTICLE 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The travelling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

ARTICLE 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

ARTICLE 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

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ARTICLE 23

The Court determines what language it will itself use and what languages may be used before it.

ARTICLE 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of July 29, 1899.

ARTICLE 25

For all notices to be served, in particular on the parties, witnesses, or experts, the court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose shall be executed by means prescribed by the internal legislation of the Power applied to. They can only be rejected when this Power considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 26

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

ARTICLE 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 29

Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30

The provisions of Articles 21 to 29 receive analogous application in the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of this delegate is not recorded if the votes are evenly divided.

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ARTICLE 31

The general expenses of the Court of Arbitral Justice are borne by the signatory Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

ARTICLE 32

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the delegation.

ARTICLE 33

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

PART III.—FINAL PROVISIONS

ARTICLE 34

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

The **President** puts the entire project to a vote.

Voting for, 37: Germany, United States of America, Argentine Republic, Austria-Hungary, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Siam, Sweden, Turkey.

[189] *Voting against,* 3: Belgium, Roumania and Switzerland.

Abstaining, 4: Denmark, Greece, Uruguay and Venezuela.

The **President** declares that the project is accepted.

His Excellency Sir **Edward Fry** reads aloud the following proposition:

> The Conference recommends to the signatory Powers the adoption of the draft voted by it for the creation of a Court of Arbitral Justice, and putting it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.

His Excellency Mr. **Nelidow** vigorously advocates the proposition of his Excellency Sir EDWARD FRY: it is a happy way of terminating all the discussions over the constitution of the Court of Arbitral Justice. No agreement has been reached with regard to the composition of the Court, but we may, nevertheless, recommend to the Governments its organization, which we have examined.

His Excellency Mr. **Choate** addresses to the small minority that has voted against the project, a request to vote at least in favor of the *vœu* of his Excellency Sir EDWARD FRY.

His Excellency Mr. **Carlin** states that he finds it impossible to recommend to his Government a project which it has directed him to oppose and whose principle it does not accept.

His Excellency Mr. **Nelidow** replies to his Excellency Mr. CARLIN by stating that there is no question of recommending to his Government a project which it is unable to accept, but when the latter shall see that so many Powers have accepted this project, it will not find fault with him for having submitted it, without in the least assuming any obligation.

Mr. **José Gil Fortoul:** The Venezuelan delegation will vote for the *vœu* of the British delegation, provided it is understood that in the constitution of the Court of Arbitral Justice and in the selection of the judges the principle of the juridical equality of the States will, at all events, be expressly recognized.

His Excellency Sir **Edward Fry** requests the adoption of the text that will secure the largest number of votes and that will assure to his proposition a place in the Final Act.

Mr. **Louis Renault** believes that the word "*vœu*" does not exactly suit the text proposed by his Excellency Sir EDWARD FRY. If it were desired to adopt it, it would be necessary slightly to change the phraseology of the text.

His Excellency Mr. **Nelidow** believes that, since the proposition is more than a *vœu* and less than a resolution, it might be well to give it its true name, that of a recommendation.

The **President** observes, in connection with this discussion, that it will be only at the time of drafting the Final Act that the question of unanimity may be raised. Until then, the Commissions only prepare the deciding agencies for the plenary Conference, and their texts are generally approved by a mere majority which, it may be hoped, even to the last minute, may be changed into unanimity.

[190] His Excellency Count **Tornielli** requests that no change be made in the character of the proposition of his Excellency, the first delegate of Great Britain. This proposition having been presented as a *vœu*, it is in that form that it will be proper to introduce it into the acts of the Conference. We will thus obviate the difficulties inherent in the classification of international acts of a general nature when they have not yet completely secured a unanimous vote. Diplomacy does not like to depart from certain rules furnished it by precedents. In this special case, the Conference of this year may find in the Acts of 1899

examples to be followed. The Final Act of the First Conference may even now appear as a document which it might be well to consult. We find in it, for instance, that the rule of unanimity has not been rigidly followed by the Conference of 1899 when concerned with mere *vœux*. A resolution adopted and inserted into the Final Act had, on the contrary, been unanimously adopted. Although it may not be quite correct to say that *by a vœu we recommend* something, it would be preferable to preserve for the proposition of his Excellency Sir EDWARD FRY its title of simple *vœu*, since it is even now almost certain that this proposition too will not secure a unanimity of the votes. It is true that in 1899 two declarations contained in the Final Act had not secured a unanimous vote. One of them, that which concerns the use of certain projectiles, had obtained two contrary votes, that of North America and that of Great Britain. It was, nevertheless, not thought that the refusal of their votes by two great Powers should prevent the other States from considering as valid the arrangement for a special case, fortunately destined not to arise except in the abnormal time of war. In the course of this meeting it has been asked what is this rule of unanimity and of quasi-unanimity and to what extent it is applicable. In this matter it seems that it might be said that unanimity is the rule, but that this rule is not so rigid but that one may give it certain exceptions, arising, for instance, when some State, although for special reasons it may refuse to give its vote to an international agreement, does not believe it to be its duty to oppose the favorable votes given by the other States. It is thus that the quasi-unanimity of the Powers is secured, by not taking into account any other factor and independently of the importance of the State which refused to accept for itself what the rest have adopted.

His Excellency Mr. **Carlin** approves of the remarks of Count TORNIELLI.

He, like Count TORNIELLI, asks that the proposition of his Excellency Sir EDWARD FRY retain its title of "*vœu*." Indeed, and this in accordance with the precedents of 1899, it may be admitted that a *vœu* may be incorporated in the Final Act without having secured unanimity, as long as the delegations that have not accepted it do not object to such insertion.

His Excellency Mr. CARLIN adds that, desirous of taking into account the remarks of Mr. NELIDOW, he will not be opposed to the insertion, in the Final Act, of the proposition of Sir EDWARD FRY, if it is retained in its quality of a *vœu*.

After an exchange of views in regard to this matter, the Commission decides that the proposition will bear the title of declaration.

The meeting closes at 7 o'clock.

[The annex to this meeting (pages 191-193 of the *Actes et documents*), being an English text of the speech of Mr. CROATE which appears *ante*, pages 168-170, is omitted from this print.]

[194]

TENTH MEETING

OCTOBER 11, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5 o'clock.

The minutes of the eighth and ninth meetings are adopted.

The **President** communicates a rectification of the Mexican delegation which voted "no" on October 10 upon the Austro-Hungarian proposition.[1]

In the next place he states that the committee instructed, in the last meeting, to submit a formula presenting the points of agreement, has drafted the following declaration:

> The Commission,
>
> Actuated by the spirit of mutual agreement and concession characterizing the Peace Conference,
>
> Has resolved to present to the Conference the following declaration, which, while reserving to each of the States represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted:
>
> The Commission is unanimous,
>
> 1. In admitting the principle of obligatory arbitration;
> 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without any restriction.
>
> Finally, it is unanimous in proclaiming that, although it has not yet been found feasible to conclude a Convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the collected States not only have learned to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity.

His Excellency Mr. **van den Heuvel**: Yesterday, gentlemen, I addressed an appeal to the sentiment of conciliation; I should fail now in living up to
[195] that appeal if I did not rise to declare that the Belgian delegation will vote in favor of the declaration which our distinguished President has just read to us.

We will vote it in the same sense and with the same spirit in which we voted yesterday for the resolution presented by the first delegate of Austria-Hungary.

And I am inclined to believe that we will be unanimous in giving a testi-

[1] Annex 45.
[2] Annex 74.

mony of our sympathy and of our fidelity to the principle of obligatory arbitration. (*Applause.*)

His Excellency Mr. **Beldiman** concurs in the declarations of the Belgian delegation: it is in the same sense and with the same spirit that the Roumanian delegation will give its affirmative vote to the declaration read by the President.

His Excellency Mr. **Choate** speaks in English as follows:

Before the vote is taken upon the proposition which is now before the Commission, I desire, on the part of the delegation of the United States of America, to make a brief statement.

The principles that have guided our action in the past in the Conference, and will control it in the vote upon the present proposition, are as follows:

The immediate results of the present Conference must be limited to a small part of the field which the more sanguine have hoped to see covered, but each successive Conference will make the positions reached in the preceding Conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each Conference will inevitably make further progress, and by successive steps results may be accomplished which have formerly appeared impossible.

We have kept always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on, and we are inclined to regard the work of this Second Conference not merely with reference to the definite results to be reached here, but also with reference to the foundations to be laid for further results in future conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the delegates may reach no definite agreement.

We have carried the process of discussion upon the project which we introduced and have advocated, and on which the Commission has voted, as far as our instructions permit, which are to the effect that after reasonable discussion, if no agreement is reached, it is better to lay the subject aside or refer it to some future conference in the hope that intermediate consideration may dispose of the objections.

After three months of earnest consideration and discussion the Commission reached, before the introduction of the present proposition, by a majority of four to one of the entire membership of the Conference, the adoption of our project for carrying the principle of obligatory arbitration into concrete and practical effect, by an agreement proposed to be entered into between nations who supported the project, leaving it open for the rest to dissent or to adhere as they might afterwards be advised.

It would seem to have been the legitimate sequence of that action that the project should be carried before the Conference and find its place in its Final Act. We therefore regard the present resolution as a very decided and
[196] serious retreat from the advanced position in favor of obligatory arbitration which the Commission has already reached, and one which in our judgment cannot but seriously retard and imperil the progress of the cause of arbitration in general. We therefore cannot conscientiously, without an abandonment on our part of the principles for whose practical application we have so long contended, vote for the resolution now under consideration. Not because

we do not favor the principle of obligatory arbitration, for it is that for which we have been from the beginning contending, but because it is practically an abandonment by the Commission of the advanced position which, by such a decisive vote, it had already reached, and I am therefore instructed by the delegation to abstain on the present vote.

His Excellency Mr. **Keiroku Tsudzuki** states that in view of the fact that until now he has abstained from joining in the discussions dealing with the matters of obligatory arbitration, he will also abstain this day from voting upon the declaration.

His Excellency **Réchid Bey** states that the Ottoman delegation will abstain from voting while awaiting new instructions.

His Excellency Sir **Edward Fry**: I regret from the bottom of my heart that the project will not be presented to the Conference.

I regret equally that the United States of America feels that it is not able to vote in favor of the declaration presented to us.

I regard this declaration as an acknowledgment of the progress already accomplished by the First Commission and not as an abandonment of its results.

His Excellency Mr. **Nelidow**: If I speak it is not to continue the discussion, but at this very moment the success of the Conference is at stake. It is unfortunately evident that it has not been able and was never able to establish by a unanimous vote the desire of the great majority. But we must finish—and we can only finish by mutual concessions. I, therefore, appeal to your good-will in order that it may not be said that we were incapable of reaching unanimity upon this important subject of our deliberations.

The **President** puts the declaration which he had previously read aloud to a vote.

It is accepted unanimously, with four abstentions (United States of America, Haiti, Japan, Turkey).

The announcement of the results of this vote is received with loud applause.

The **President**: It is with profound satisfaction that we can close our labors at an hour when a nearly unanimous vote unites the States represented at the Conference.

Our task has been very long and but a moment ago I called for a summary of it from the secretariat:

The First Commission held	10	meetings.
The first subcommission	11	"
Committee A	17	"
Committee B	8	"
Committee C	11	"
The second subcommission	3	"
Its committee of examination	3	"

This makes a total of 63 meetings.

[197] Those who thought that the Conference lasted too long could not realize the intensity of such a work. Can it be said now that this work has not been unproductive and that it has yielded results?

I believe, for my part, that these results are important and that our Commission may with some pride go before the plenary Conference.

In the first place, we have organized a "prize court," that is to say, a tribunal whose decisions will constitute the register of the universal jurisprudence among the maritime nations. You are aware of the difficulties that have arisen with regard to this question, the doubts and the oppositions at the opening of the Conference, the systems that were face to face with each other and which seemed separated by irreconcilable differences. Thanks to the good-will of the authors of the various projects, these difficulties were overcome and the new institution may be regarded as built and supported by all the States of the world. That is the work of the second subcommission.

As regards the first subcommission, it pursued four great studies: the improvement of the Convention of 1899, the matter of obligatory arbitration, the American motion regarding contract debts and the constitution of a court of arbitral justice.

As regards the Convention of 1899, improvements bore upon the very essence of it and not only upon the form. The legislation of the commissions of inquiry, commissions that have proven their value with regard to the safeguarding of peace, has been taken up again and perfected. With regard to arbitral procedure, this has been made more elastic, easier and less costly: hence, recourse to arbitration will become more frequent. In the matter of obligatory arbitration, I need not recall the difficulties of our labors and the vigor of our discussions, but as evidenced by the declaration which we have just voted, never, at any moment, have other than purely juridical motives animated the members of this Commission.

If it has not been possible to secure unanimity for the project developed after four months of study, at least some points of agreement have been reached that will make it impossible for anyone to believe that there has been retrogression. As stated by Sir EDWARD FRY, the distinguished dean of the jurists in the Conference—and possibly in the world—we have been able to make an important "statement of facts."

The establishment of two essential principles recognized by all—a realization also of the difficulty there is in persuading certain States at present to accept the project of the majority—and lastly the realization that these divergencies concern more the matter of *time* than of principle, and permit us to hope that all of us will, within a more or less short period of time, end by uniting in the same conception. Thus, nothing of all that has been discussed, planned and accepted by us, will be lost.

Another result is the vote of the American delegation: in adopting it, the Conference eliminates one of the most frequent causes of conflicts, that of contract debts. Henceforth, upon this special point, resort to force will be forbidden until an appeal shall have been made to arbitration.

Finally, I come to the last chapter of our labors: the Court of Arbitral Justice. Here again we have not completed our work. It is none the less true that something has already been accomplished: the method for the operation of the institution has been absolutely settled. The machinery is ready; it will now suffice to provide it with a source of energy.

The work of the eminent men who have here collaborated has been considerable. As to the efficacity of this work, we can properly judge of it only after a necessary lapse of time. As long as this lapse of time has not occurred, the work here accomplished may not be realized by most of us. It was even so

with the Conference of 1899. But little consideration was given it. But one day when the dangerous Hull case was settled, people came to understand the possible importance and benefits of a simple Hague text. This will prove equally true of the work of this First Commission of which it may, later on, be said that it has deserved well of mankind. (*Applause.*)

[198] I do not want to close our meetings without an expression of thanks to those of our collaborators who have more especially aided us and without whom we could not have successfully performed our task. In the first place, I shall refer to our two distinguished reporters, his Excellency Baron GUILLAUME and Mr. SCOTT. (*Applause.*)

I desire also to thank others of our collaborators: those who are before us and who, faithfully, during sixty-three meetings have recorded our discussions and who have vied with each other in their zeal to provide us in due time with the printed reports. In this First Commission they have performed an exceptional work and are deserving of a special expression of thanks, and I want to depart from the customary rules by naming them before you, in order that their names, associated with the great work of arbitration, may pass from the minutes into the records of history. They are Messrs. VAN ROIJEN (the Netherlands); MARGARITESCU-GRECIANU (Roumania); JAROUSSE DE SILLAC (France); SPOTTORNO (Spain); MANDELSTAM (Russia); Baron GUILLAUME (Belgium); DE JONGE (the Netherlands). (*Applause.*)

I do not want to forget the distinguished President of Committee C, his Excellency Mr. FUSINATO, who by his good humor, his kindness and great competence, has carried to a successful ending a minute and useful work. (*Applause.*)

As for Mr. D'ESTOURNELLES, he is too much of a personal friend of mine for me to undertake to eulogize him. (*Prolonged applause.*)

The secretary of the other subcommission, Mr. MAURA, Count DE LA MORTERA, absent to-day, is also entitled to the testimony of grateful remembrance that we have sent to him. (*Applause.*)

I have finished.

No one will be surprised to learn that the First Commission has not entirely solved all problems that were laid before it. When a certain question is laid before a parliament, it sets aside several sittings for its study and to find a solution for it: its work is like Penelope's web of which no one can foresee the completion. Why should we be more exacting with regard to the Peace Conference? It cannot, in only one of its sessions which take place every seven or eight years, exhaust its program—especially when dealing with matters of century-old experience and which, up to the end of the twentieth century, have withstood attempts at codification.

It would be exacting too much if we were to require of the child that is here growing up all the attributes of majority and maturity.

Let us, therefore, turn with confidence to the eminent President of the Second Hague Conference and ask him if we have not well labored. (*Prolonged applause.*)

His Excellency Mr. **Nelidow**: It is with pleasure that I desire to fulfill this duty of gratitude towards the First Commission; but it is made doubly difficult, both because of the eloquence of Mr. LÉON BOURGEOIS to whom I am to reply, and by the inadequacy of the vocabulary of which I have already exhausted all laudatory expressions.

I will say, however, that the labors of the First Commission constitute an admirable work and that the sixty-three reports of its minutes which give us a faithful picture of it, represent an inexhaustible source for the questions that have been studied.

Another phase of this long collaboration is the harmony that has not ceased to reign, and the first delegate of the United States was perfectly justified in stating that such an example was a model for the other assemblies.

[199] In short, gentlemen, what we have done here has been accomplished with prudence and restraint, but also with substantial results, and all of us will, from these four months of labor, carry away with us a comforting remembrance. (*Applause.*)

His Excellency Mr. **Mérey von Kapos-Mére.** Mr. PRESIDENT, GENTLEMEN: It is thoroughly agreed that we shall no longer speak here of majority or of minority. Permit me, nevertheless, to make a single and last exception and to say a few words in behalf of the minority which had come into existence up to the meeting of yesterday within the First Commission. I will add immediately that this only and sole time what I have to say will meet—I am quite certain—with the unanimous approval of the entire Commission.

I desire especially and expressly to concur in the words, so eloquent and at the same time so just, which his Excellency the President of the Conference has just addressed to our distinguished President. If, but a little while ago, we adopted a declaration stating the three points upon which unanimity was secured, this statement would be hardly complete, to my mind, if we did not add, at least verbally and in our minutes a fourth point upon which unanimity was also secured from the very first meeting of the committees of examination up to the last meeting of the Commission, that is to say, the high esteem and the admiration with which we are animated toward our President. We all will carry away with us an unforgettable impression of the discussion, so interesting, so profound and so elevated, which has taken place in this Commission and in our committees of examination, and we shall keep at the same time, all of us without exception, a grateful and affectionate remembrance of the eminent statesman who has directed our discussions.

His Excellency Mr. **Choate** expresses himself in English[1] in these terms:

Mr. PRESIDENT: You are in yourself, if I may be permitted to say so, the subject which, when we come to distribute the eulogies of the Commission, commands and receives that absolute unanimity which some claim to be necessary, but which it has been so difficult always to obtain in the course of our labors.

What we are now considering, our parting word to you, sir, is neither a "*vœu*," nor a resolution, nor a recommendation, but a heartfelt declaration in which all your colleagues will be most happy to concur. All those among us who, in the exchange of compliments which you have so freely distributed, have escaped any share therein, are of one mind, if we may be permitted to add to the happy words of his Excellency the President of the Conference, just addressed to you, and we cannot fail to recognize with profound admiration the absolute impartiality, in all other respects, with which you have from the beginning guided our proceedings.

[1] See footnote, *post*, p. 199.

It is now four months ago that we assembled here. We have discussed, we may say without boasting, most difficult and delicate subjects all the time, which involved not only serious thought but sometimes our deepest feelings, and what is truly remarkable is, that in all that time not a single day has witnessed, so far as I can remember, the least bad temper. Certainly there have been some lively moments. The earth has occasionally trembled beneath our feet. Etna has rumbled and Vesuvius occasionally has given a flash, but never once
[200] has there been a volcanic eruption. At every moment the Commission has been mistress of its own passions. This truly is a remarkable circumstance, and no assembly of such importance that I have ever heard of has assembled and continued together so long a time and given such a marvelous example of order and harmony.

All this I attribute, Mr. President, to the powerful influence which you have never ceased to exert over those who are subject to your sway. It is your genial presence and the gladness and light that always radiate from your person that are accountable for this happy result. No other man among us could possibly have kept us more closely together or brought us more nearly to the desired goal of absolute unanimity.

Certain newspapers which I have read have given the impression that our labors have not been considerable or important, but, on the contrary, I am of opinion that we have a right to be proud of what we have done, and that everything that high endeavor and conciliatory spirit and untiring industry could bring about has been actually accomplished.

To begin with, the International Court of Appeal in prize constitutes a new departure of very high importance. It will substitute for the selfish edicts of national courts, rendered under the excitement of war in which their States were engaged, the supervising judgment of a serene and impartial appellate tribunal, which will aim at nothing short of absolute international justice and right. I have little doubt that it will be accepted and approved by the Governments, and that it will not fail to advance the cause of justice and of peace. Under its administration the common welfare of the nations will take the place of self-interest in the adjudication of national disputes.

We have also the earnest conviction that the day is not far distant when the Court of Arbitral Justice will be established in reality on lasting foundations. It is true that in forming the constitution of such a court and recommending to the nations its establishment thereon, when they shall have arranged among themselves as to the number and distribution of judges, we have not completed the work, but we have laid the corner stone upon which this new and great tribunal of arbitration will be erected, just as we aided our distinguished president in laying the corner stone of the new Palace of Peace within whose walls the meetings of these new tribunals will be permanently held. They say that we cannot guess how long a time will elapse before this final result of our labors shall be realized, but what we could not finish in four months, the nations that we represent—in whose lives four years are as nothing—will, before the meeting of the next Conference, I am sure, complete.

We have done much besides. We have, with actual unanimity, established the rule that force shall not be resorted to for the collection of contract debts against a nation until arbitration has been had or refused, by adopting a resolution which will carry the name of General PORTER into all quarters of the earth

where nations borrow money, and down to distant generations as long as they shall fail to pay their debts, which perhaps means as long as grass grows or water runs.

We have also made suitable arrangements for better preparation for the work of the next Conference, for its being regulated from the outset by the joint action of the Powers, and for its more suitable organization and procedure, so that its labors may be rendered more easy and more effective than ours have been.

[201] There are many other steps forward in the path of progress that we have taken, and although it is true that we have failed now to reach complete unanimity on the subject of obligatory arbitration, we who have advocated it do not despair, and have never been better assured than at this moment that that great cause will triumph at last, and that by the common consent of the nations arbitration will be substituted for war,—a result which will at last obtain universal approval.

During these four months, Mr. President, we have lived happily under your benign dominion. We have worked hard and have earned the bread of the Conference by the sweat of our brows, and there have been moments of trial and suffering, but in separating we look back with satisfaction upon our labors, thanks greatly to your beneficent and harmonizing spirit. (*Applause.*)

His Excellency Sir **Edward Fry** requests to be permitted to say a word and to thank the President most heartily for his impartiality, his patience and his friendship toward all his colleagues.

His Excellency Mr. **Keiroku Tsudzuki,** in his quality as representative of a Power from the Far East, desires to pay homage to the personality of the eminent President who conducted the labors of the Commission.

His Excellency Mr. **Lou Tseng-tsiang**: In my quality as the youngest of the honorary presidents of this Conference, I should like to take the floor in order to offer, before we separate, an expression of the sentiments of admiration and of sympathy that move us all with regard to the President of the Commission and of the President of the Conference.

As their Excellencies Mr. Mérey and Mr. Choate anticipated me in such an eloquent way, I can but warmly concur in the words pronounced by the honorable chiefs of the delegations of Austria-Hungary and of the United States of America, words that faithfully interpret my own feelings.

The **President**: For the first time, I am strongly inclined to exercise a despotic authority, and for fear that someone still will ask the floor, I would refuse it to all. Above all, I desire to say this: if it were a matter of offering expressions of thanks, it would behoove your President to address them to you.

The president becomes important by reason of the assembly over which he presides.

But a little while ago reference was made to the radiation which he spreads: you may believe me, gentlemen, that he but reflects the light that is brought to him. An orator vibrates when all about him vibrates; his eyes become animated when the eyes of his auditors shine; his own thoughts arise to a noble plane when he becomes aware of the noble thoughts of those who listen to him.

And so, gentlemen, it is you to whom the president must offer thanks for having inspired and ennobled his task. (*Applause.*)

There are two things I forgot to speak about and to which I desire to refer

in thanking our collaborators. I have left out personal reference to Mr. DOUDE VAN TROOSTWIJK, our secretary general, who was good enough to attend all the labors of our First Commission, and Mr. LOUIS RENAULT, one of our reporters, I ought to say, the first of our reporters. But this failure, no doubt, is due to the fact, as stated by his Excellency Mr. NELIDOW, that all our vocabulary has been exhausted with regard to him. I must also thank Mr. LAMMASCH, the vice-president of the second subcommission, who has so happily contributed to the efficacy and loftiness of our discussions. (*Applause.*)

The meeting closes at 6:30 o'clock.

[The annexes (A and B) to this meeting (pages 202-204 of the *Actes et documents*), being an English text of the speeches of Mr. CHOATE which appear *ante*, pages 192, 193 and 196-198, are omitted from this print.]

FIRST COMMISSION

FIRST SUBCOMMISSION

[207]

FIRST MEETING

JUNE 25, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 2:45 o'clock.

The **President** invites the honorary presidents and the vice presidents to sit with the Bureau.

The PRESIDENT recalls that the Commission is subdivided into two subcommissions, the first relative to arbitration, the second relative to the prize court. The Commission that sits now is that of arbitration.

The PRESIDENT expresses the regrets and presents the excuses of the Bureau with regard to the minutes of the last meeting; the tardiness of its distribution and the defects of its make-up are explained by the fact that difficulties are always encountered in the beginning.

Although he would desire to preside over the two subcommissions, the PRESIDENT must foresee the case of physical prevention. He proposes, therefore, Mr. FUSINATO, delegate of the country of which it may be said, and justly so, "that it has always been at the head of the movement in favor of arbitration," to take his place as President of the first subcommission. (*Applause.*)

The PRESIDENT then passes on to the selection of the secretary.

His Excellency Mr. **Asser**: Among my fondest recollections are those of the committee of examination of 1899 which had for its secretary, Baron D'ESTOURNELLES DE CONSTANT. We, all of us, are aware of his zeal to diffuse the ideas that are dear to us; but we know, furthermore, that he possesses editorial qualities that make him the ideal secretary. I have the honor to propose him again to assume the functions. (*Applause.*)

The proposition of his Excellency Mr. ASSER is accepted.

Whilst in the second subcommission there are delicate questions to be solved—so states the **President**—the first subcommission finds immediately a very natural basis for discussion, that is to say, the text itself of the Convention of 1899 for the pacific settlement of international disputes.

[208] The subcommission might, therefore, even now appoint its reporter and the PRESIDENT would propose for these functions his Excellency Baron GUILLAUME who is not merely a distinguished jurist, but also represents Belgium, a country to which Baron DESCAMPS, our reporter of 1899, also belonged. (*Applause.*)

The PRESIDENT communicates a decision reached by the four presidents in regard to the dates of the meetings of each commission. The afternoons would be apportioned as follows: Tuesday afternoon would be reserved to the first Commission; Wednesday afternoon to the second, Thursday to the third, and Friday to the fourth.

The presidents have likewise reserved forenoons to each commission:

Tuesday forenoon for the Third Commission;
Wednesday forenoon for the Fourth Commission;
Thursday forenoon for the First Commission;
Friday forenoon for the Second Commission.
Neither Monday nor Saturday have been set aside.

According to this organization the First Commission would have the afternoon of Tuesday, the Third Commission the forenoon of the same day and so forth.

There will always be an interval of thirty-six hours between the afternoon and the forenoon reserved to each commission. (*Approval.*)

His Excellency Mr. **Martens** submits three propositions in the name of the Russian delegation, the first with regard to the organization of the commissions of inquiry; the second in regard to the improvement of the Permanent Court of Arbitration (in two leaflets); and the third in regard to arbitral justice.[1]

In submitting these projects, the Russian Government means to furnish material for the work of the Conference, and it will be grateful for all that can be done to complete and improve them.

Mr. **Kriege**, in the name of the German delegation, submits a proposition relative to the Hague Arbitration Convention.[2]

His Excellency Sir **Edward Fry** recalls that he has taken part as legal assessor in the commission of inquiry in regard to the Hull incident.

The rules that were adopted on that occasion may not be perfect, but it will no doubt be agreeable to the subcommission to be in possession of a copy thereof, and to that end he hastens to deposit the text with the Bureau by way of a document.

The **President** recapitulates all the projects that have been submitted:

1. two German projects, one concerning arbitration,[3] and the other concerning the prize court;[4]

2. a Mexican communication concerning arbitration;[5]

3. two French propositions, one in regard to the commissions of inquiry,[6] and the other in regard to improvements to be made in the procedure of the Convention of 1899;[7]

4. the proposition of the United States of America concerning the collecting of public debts;[8]

5. three Russian propositions regarding arbitration;[9]

6. a German proposition on the same subject.[10]

The PRESIDENT has special record made of the deposit of these propositions.

[209] As regards the method for the work of the subcommission, the PRESIDENT

[1] Annexes 2, 10 and 11.
[2] Annex 12.
[3] Annex 8.
[4] Annex 88
[5] Annex 60.
[6] Annex 1.
[7] Annex 9.
[8] Annexes 48, 50 and 59.
[9] Annexes 2, 10 and 11.
[10] Annex 12.

believes that it necessarily consists in taking as a basis for discussion the Convention of 1899. While proceeding with the reading of the text, the discussion will take place upon each article, and the whole range of the discussions will be summarized by the secretaries, and later on, the minutes themselves will be summarized by the reporter.

It is well understood that at the next meeting each of the members of the subcommission will have before him the Convention of 1899, so that he may follow the reading of it. To facilitate the work, the President appeals to the secretariat and requests it to prepare as soon as possible a text of the Convention of 1899, printed on one-half side of the page and bearing, opposite each article, the corresponding text of the various modifications that are proposed.

It goes without saying that there can be no foreclosure against any future proposition and that complete liberty of initiation and of discussion is assured to everyone during the entire course of the discussions.

The PRESIDENT consults the assembly with regard to the date of the next meeting. It is agreed that it shall take place Thursday forenoon at 10:30 o'clock; that at that time the reading of the Convention of 1899 will be begun, but on the condition that such reading will be restricted to the articles not giving rise to any discussion; the other articles will be reserved by mutual agreement for the following meetings. (*Approval.*)

The meeting closes at 3:20 o'clock.

[210]

SECOND MEETING

JUNE 27, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:45 o'clock.

The minutes of the first meeting are adopted.

Baron **d'Estournelles de Constant**: The secretariat by a veritable feat of skill has been able to submit even this morning the work called for day before yesterday.

The Commission thus has before it the articles of the Convention of 1899 for the pacific settlement of international disputes, and opposite these the corresponding articles of the new projects. But it is understood that this text is provisional, for all the projects have not yet been presented.

The **President** is glad to join in the congratulations addressed to the secretaries: their work has been considerable and they were obliged to devote a part of the night to its accomplishment. He will, therefore, be the interpreter of all in expressing thanks to his young collaborators.

The PRESIDENT asks that as soon as possible the projects relative to the Convention of 1899 be presented. It is in the interest of their authors to have their text printed so as to face the articles of this Convention.

He then asks to be permitted to thank his Excellency Mr. NELIDOW for the honor he will confer upon the subcommission by taking part in its labors.

The PRESIDENT received from his Excellency Mr. NELIDOW a communication from the Netherland Minister of Foreign Affairs with regard to the text of a resolution in four languages, adopted on August 7, 1906 by the Third International American Conference which met at Rio de Janeiro, and which Brazil was requested to present to the Second Peace Conference.[1]

The PRESIDENT reads aloud this text which recommends the establishment of a general international arbitration convention.

Special record is entered of the deposit of this document which constitutes the declaration of the sentiments of the American delegations, rather than a proposition to be brought up for discussion.

The PRESIDENT then reads aloud a communication from his Excellency Mr. RODRÍGUEZ LARRETA, delegate from the Argentine Republic, with regard to a project of declaration concerning international arbitration.

[211] In contradistinction to the preceding, this document will have to be inserted in the text prepared by the secretariat.

The PRESIDENT has also received from the delegation of the Argentine Republic the collection of general arbitration treaties that have been signed by this

[1] Annex 62.

country.[1] He expresses to his Argentine colleagues the thanks of the subcommission for these texts which will prove very useful for its discussions.

The PRESIDENT takes up the program of the day of the sitting and speaks as follows: The reading which we are going to have of the Convention of 1899 is only the first reading. We must reserve our full liberty to take up again the points already examined. For we must not forget that we are not met here as a political assembly where record is immediately made of the votes cast, in order to establish the attitude of the parties. We are a diplomatic assembly in which one attempts to come to an agreement upon a common text. This is, furthermore, the only method compatible with the loyalty and the cordiality that must ever dominate our relations. (*Approval.*)

The PRESIDENT begins the reading of the Convention of 1899.

Their Excellencies Mr. **Asser** and Mr. **Carlin** call for explanations regarding Article 1 of the French proposition,[2] printed opposite Article 1 of the Convention.

The **President** observes that this text cannot have its precise meaning until the close of the discussions: for that reason it is better to reserve it.

Mr. **Louis Renault**: It is a fact that this article of the French project is in no way related to Article 1 of the general convention. The French project contemplates the establishment of a summary procedure, and the discussion can take place only at the time of the reading of the passage dealing with procedure. By putting it right in the beginning, it was intended merely to *supplement* and not to *replace* the Convention of 1899.

The **President** summarizes this incident by stating that this text is not in its proper place, and that it will suffice to regard it as not included in the program. To meet the objections of their Excellencies Mr. ASSER and Mr. CARLIN, it will subsequently be taken up for study.

The PRESIDENT reads aloud the first articles of the Convention of 1899 for the pacific settlement of international disputes.

PART I.—THE MAINTENANCE OF GENERAL PEACE

ARTICLE 1

With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.

(*No remarks.*)

PART II.—GOOD OFFICES AND MEDIATION

ARTICLE 2

In case of serious disagreement or dispute, before an appeal to arms, the signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

(*No remarks.*)

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ARTICLE 3

Independently of this recourse, the signatory Powers deem it expedient that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

[1] Annex 63.
[2] Annex 9.

Powers strangers to the dispute have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

His Excellency Mr. **Choate** presents an amendment to Article 3. He proposes to add to the first line, after the word "*expedient,*" the words "*and desirable.*"

To the request of Mr. **Kriege** to be permitted to offer some remarks with regard to the question as to whether or not propositions to amend must be immediately put to a vote, the **President** replies by stating that, in order to live up to the method adopted, the subcommission must not enter into the discussion of this amendment which will be taken up subsequently.

Article 3 is then adopted, under reservation of the addition proposed by his Excellency Mr. CHOATE.

The **President** reads aloud Articles 4 to 8 of the Convention of 1899.

ARTICLE 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

(*No remarks.*)

ARTICLE 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

(*No remarks.*)

ARTICLE 6

Good offices and mediation, undertaken either at the request of the parties in dispute, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.

(*No remarks.*)

ARTICLE 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted, unless there be an agreement to the contrary.

(*No remarks.*)

ARTICLE 8

The signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

[213] In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

(*No remarks.*)

Parts I and II are thus adopted, save the amendment of his Excellency Mr. CHOATE.

Mr. **Kriege** calls the attention of the secretaries to an error that has slipped into the first paragraph of Article 31 *a* of the German proposition:[1] in the second line the word *"compromis"* must be replaced by *"obligatory arbitration,"* and in the third line the words *"special arbitration treaty"* must be replaced by *"compromis."*

After an exchange of views between their Excellencies Mr. **Asser,** Mr. **Beernaert** and Mr. **Louis Renault,** the **President** proposes that the first subcommission meet Tuesday afternoon. Indeed, the small committee of examination charged with the drafting of a *questionnaire* for the second subcommission, will soon distribute it: but it goes without saying, that it deals only with the *status* and not the *solution* of the questions. It will, therefore, have to be studied, and, if needs be, referred to the Governments, a matter which will require some time.

On the other hand, it will be advantageous to continue a discussion entered into and it may be necessary to call the same subcommission to two successive meetings. It is for these two reasons that it would be well to have the subcommission on arbitration meet on the next available day, that is to say, on Tuesday. (*Approval.*)

The program of the day for Tuesday will therefore include in the first place, the amendment proposed by his Excellency Mr. CHOATE, and next the continuation of the reading of the Convention of 1899 for the pacific settlement of international disputes. As regards the program for Thursday, it can only be determined on next Tuesday. (*Approval.*)

The meeting closes at 11:10 o'clock.

[1] Annex 8.

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THIRD MEETING

JULY 2, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:15 o'clock.

The **President** desires to present a general remark concerning the phraseology of the last minutes. It is therein stated that each of the articles of the Convention of 1899 which has so far been read has been adopted. This word "*adopted*" would seem to imply that the texts voted in 1899 need to be voted again by the present Conference, but this is not so; the articles adopted in 1899 remain in force; only those whose modification is proposed, are brought up for discussion. It will, therefore, be necessary to replace in the minutes the word "adopted" with the words: "*no remarks.*" (*Approval.*)

The PRESIDENT informs his colleagues of the death of his Excellency COUNT NIGRA, and speaks as follows:

From the very beginning of our labors, homage has been paid to the memory of those of our collaborators of 1899 who are no more.

Death has this day taken from our midst one of the best among the good workers of the first hour. This sad news evokes in us the memory of the services rendered by Count NIGRA at the First Conference, especially in his very active participation in the labors of the arbitration commission and of its committee of examination, as well as in those of the Drafting Committee of the Final Act.

To speak only of his rôle in the Peace Conference, Count NIRGA was the model of diplomatists. He never ceased conciliating the two prepossessions, political and philosophical, that absorbed his conscience; and it is particularly from this point of view, that his remembrance will remain as an example to us and that all of you, gentlemen, will associate yourselves with me in believing that a duty of high morality and of necessary gratitude prompts us to pay a high tribute to his memory. (*Applause.*)

Coming to the program of the day, the PRESIDENT observes that it will probably be impossible to discuss this day the articles relative to the international commissions of inquiry, for he has just received diverse new propositions: the first from the delegation of Italy,[1] the second from the delegation of the [215] Netherlands,[2] the third from the delegation of Great Britain,[3] the fourth from the delegation of the United States of America.[4] The subcommission is not ready to discuss these projects with which it is not acquainted; to facilitate their study, the PRESIDENT requests Baron D'ESTOURNELLES DE CON-

[1] Annex 3.
[2] Annex 4.
[3] Annex 5.
[4] Annex 48.

STANT and Mr. JAMES BROWN SCOTT to add them to the compared texts already prepared by the secretariat.

The PRESIDENT reminds all his colleagues of the urgent necessity for them to submit all their propositions; he desires that all be communicated before the next meeting.

In passing on to the amendment proposed by his Excellency Mr. CHOATE, the PRESIDENT proposes to add the words "*and desirable*" after the word "*expedient*" to the first line of Article 3.

No objections being raised, the addition is directed to be made.

Special record is made of the deposit by the delegation from the Netherlands of a collection of documents, relative to the procedure of the permanent arbitration court.[1]

The order of the day having thus been disposed of, the PRESIDENT, upon the suggestion of Mr. LOUIS RENAULT, proposes that the members of the subcommission go together and inspect the seat of the permanent arbitration court. (*Approval.*)

For fear that the date of Thursday next be too near in order to permit of a study of the new projects, the PRESIDENT proposes to take up the matter of the court of maritime prizes. Messrs. KRIEGE and RENAULT not having objected to the proposition, he will confer with his English colleagues, and, in case of their approving of it, the second subcommission will meet Thursday, July 4, at 10:30 o'clock.

The meeting closes at 3:45 o'clock.

[1] Annex 64.

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FOURTH MEETING

JULY 9, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3: 15 o'clock.

The minutes of the third meeting are adopted.

The **President** summarizes the substance of the propositions that have been submitted. He regards himself as interpreter of all in thanking Messrs. Baron d'Estournelles de Constant and Scott, and in particular the secretary of the Commission, who have drafted the synoptic list of the various modifications proposed to the Convention of 1899 for the pacific settlement of international disputes (1st Part); it is not the first time that the secretariat gives proof of an attention and a zeal to which members of the Commission are unanimous in rendering homage. (*Prolonged applause.*)

The President reads aloud a proposition from the delegation of Chile relative to arbitration which has just been laid before the Bureau.[1]

His Excellency Count **Tornielli** declares that it appears from the communications made by the Italian delegation, that his Government is even now bound by arbitration conventions with most of the States represented at the Conference.

His Excellency Mr. **Ruy Barbosa,** in the name of the delegation of the United States of Brazil, makes the following declaration:

In case any agreement should be reached in regard to the principle of obligation applicable to international arbitration for disputes of a legal nature or with regard to the interpretation of treaties, no matter under what form it may be adopted, the Government of the Republic of the United States of Brazil desires to declare preliminarily, that it does not and will not consider that this principle may be extended to questions and litigations now pending, but only to those which might arise after its act of adhesion of June 15, 1907, to Convention I of the First Hague Conference.

His Excellency Mr. Ruy Barbosa then proposes an amendment to Article 16 of the Convention of 1899.[2]

[217] His Excellency Baron **Guillaume** makes the following declaration:

Belgium, faithful to her traditions of the spirit of justice and of conciliation, has ever given proof of her sympathies useful to the beneficent principle of arbitration.

As far back as 1875, a motion voted by her parliament bound the Government of the King, our august sovereign, to endeavor to introduce, in the treaties that it might initiate, a clause submitting to arbitration the disputes that might arise with regard to their execution. Since that time, and until the meeting of

[1] Annex 52.
[2] Annex 23.

the First Peace Conference, numerous treaties containing a *compromis* clause, have been concluded between Belgium and other Powers.

The Belgian delegates to the Conference of 1899 are happy to have been able to take an active part in the elaboration of the Convention for the pacific settlement of international disputes, a work of transaction, recording that which the present condition of international society made possible to attain in a matter which concerns the highest interests of the nations and the rights that they desire to keep from being injuriously affected.

The First Peace Conference has not set up arbitration as an obligatory institution for the Powers signatory of this Final Act; by its Article 19 it confined itself to reserving to the Powers the right to conclude general or special agreements, with a view to extending obligatory arbitration to all cases that they might deem it useful to submit to it.

As early as the year 1901, the Government of the King entered into negotiations with several States for the conclusion of conventions of this nature.

Seven treaties have been signed in the course of the years 1904 and 1905. These bind Belgium with Russia, with Switzerland, Sweden, Norway, Spain, Denmark, Roumania and Greece.

The Convention of 1899 for the pacific settlement of international disputes has stood the test; it has been satisfactory.

Four cases have been submitted to the Permanent Arbitration Court, and the application of the rules elaborated in 1899 gives rise to rather anodyne criticism; slight modifications in the rules of procedure will be easily adopted to take into account observations prompted by experience. The institution of the international commissions of inquiry has been splendidly consecrated in the course of the war between Russia and Japan; the conditions thereof are present in the mind of all of us.

The Belgian delegation, therefore, regards the Convention of 1899 as a good one, while at the same time it is sympathetically inclined to examine, with a sincere spirit of conciliation, a proposition to ameliorate, inspired by the idea of progress which it would be contrary to its traditions not to share. It, nevertheless, insists that the principles which served as basis for the work of the First Conference should be respected; it will demand the retention of the essential characters which personify and distinguish each of the different means indicated in 1899 for the pacific settlement of international disputes.

While maintaining the character of the reservations imposed upon its country by the special situation that the country occupies in the concert of the nations, the Belgian delegation would be disposed to admit that arbitration might be made obligatory between the Powers represented at the Conference, for certain classes of disputes, by means of some conditions which it will not fail to indicate in the course of the discussion to which the Commission is about to proceed.

However, it does not regard it as superfluous to remark, even now, that it would accept the principle of obligatory arbitration—reserving the disputes affecting the essential interests of the States—for all cases of controversies
[218] of a juridical nature arising from the interpretation and the application of treaties, concluded or to be concluded, between the contracting parties.

Prompted by the tendencies indicated in 1899, the Belgian delegation would likewise admit, under the same reservations, obligatory arbitration for pecuniary claims arising from damages, provided that the principle itself of indemnification

has been the subject of a previous understanding between the contracting parties.

I may add that, in our opinion, the difficulties concerning the interpretation or application of treaties in which more than two Powers have participated or to which more than two Powers adhered, cannot form the subject of recourse to arbitral procedure except by previous consent, given for each particular case, by all the signatories or adherents of these treaties.

For the moment we have no proposition to submit; we reserve unto ourselves to examine the various projects submitted to our discussions and to be led by the discussions to which they will give rise, being guided solely by our search for that which is just and possible.

The **President** has record made of the declaration of his Excellency Baron Guillaume.

His Excellency Mr. **Carlos G. Candamo,** delegate from Peru, speaks as follows in support of his proposition to add a new provision to Article 27 of the Convention of 1899:

The signatory Powers of the Hague Convention for the pacific settlement of international disputes having proclaimed in the very beginning of the Convention, that they assume the obligation "to use their best efforts to ensure the pacific settlement of international differences," it is their duty as well as the duty of the Powers that have since adhered thereto, to apply themselves to the increase of the practice, so that recourse to arbitration may be as frequent as possible on the part of the States between which there exists a dispute.

The object to be realized in such a case was to endeavor to bring about a manifestation on the part of these States of their ready disposition to accept arbitration.

In 1899, his Excellency Mr. Léon Bourgeois, in the name of the French delegation, had submitted a proposition to the end that the International Hague Bureau be given an international mandate to recall to the minds of the contending States, as soon as the dispute susceptible of arbitration arises, the convention concerning this matter and the right or the obligation approved by them, to have recourse in such case to arbitration.

It was not possible to come to an understanding as to the form that was to be given to this communication which the Hague International Bureau would have made, and the proposition of his Excellency Mr. Léon Bourgeois, supported also by Baron d'Estournelles de Constant, was not adopted. But from this idea issued Article 27 which declares that the signatory Powers consider it their duty to remind parties in dispute that the permanent court is open to them.

This Article 27 provides a means of setting arbitration in motion. It was a success for this work of peace and it marked, at the same time, the triumph of a great juridical idea.

But why did we not go one step farther? Why should one of the parties in dispute wait to be reminded that the affair could be submitted to arbitration, and if it be disposed to have recourse of itself to this means of pacific settlement, why should it not voluntarily come before the organization which, at The Hague, represents the signatory Powers of the Convention of 1899?

Although it is often difficult for one Power to make towards another one with which it is in dispute, an advance which might be considered an act of weakness, or as indicating a lack of confidence in its own good cause, it would [219] not be the same with a declaration made before the Bureau officially

charged by the Powers to secure the functioning of the jurisdiction of the permanent court and of all other arbitral jurisdiction; such a declaration would imply neither weakness nor condescension; on the contrary, it would constitute an assurance, on the part of the Power from whom it emanated of the good basis of its pretention, while at the same time declaring that it is ready to submit to the decision of the arbitral jurisdiction which the adverse party would accept.

The International Bureau of The Hague would in this way be made more active and more efficacious. Though it would not be charged, as his Excellency Mr. Léon Bourgeois would have desired, with taking the initiative, it would at least act in pursuance of the declaration received and would bring the latter to the attention of the adverse party. This would be another means of serving as a medium between the two parties and of aiding in their reconciliation, to the great profit of the cause of peace and of international justice.

In consequence, I propose that there be added after Article 27, Article 27 *bis*, which has already been distributed.[1]

The **President** then takes up the program of the day which calls for the examination in first reading of the various propositions relative to the international commissions of inquiry. The President believes that it will be necessary to open the general discussion upon this matter and proposes to grant the floor to the authors of the seven propositions in the order in which they have been submitted, as established by the synoptic list.

Mr. **Fromageot**, in the name of the French delegation, reads aloud the following declaration:

The program of the Conference states in its first paragraph: "improvements to be made in the provisions of the Convention relative to the pacific settlement of international disputes as regards the Court of Arbitration and the international commissions of inquiry."

The international commissions of inquiry are, in fact, in the Convention of 1899, the subject of only a small number of provisions.

Upon the most of the matters brought up in connection with the organization of the commissions of inquiry, their functioning and their procedure, the present Convention is silent, or confines itself by referring to the *compromis* entered into between the parties desiring to resort to this pacific means of settling a dispute.[1]

It would seem that right here, in the work of the First Peace Conference, there is a gap which experience has in fact brought to our attention. But experience also shows to what extent the happy flexibility of the text of the Convention of 1899 permits of its application to the most delicate cases.

It may, therefore, be thought that if we are to amend the work presently accomplished and universally accepted, it is important to do so only with great prudence, and by confining oneself to secure for the commissions of inquiry, as they are foreseen in the Convention of 1899, an easier access and a surer functioning.

It is in this spirit, at once of progress and of conservation, that the project [2] which the French delegation has the honor to submit to your discussion, has been conceived.

[1] Annex 15.
[2] Annex 1.

Its proposition does not again bring to discussion any one of the matters of principle already solved in 1899; it is aimed at a practical result.

In the first place, and without in any way restricting the entire freedom of the parties, it would be useful that the Hague Convention should more specifically call their attention to the different questions to be foreseen in their *compromis* of inquiry, for fear of interfering with the proper and rapid functioning of the latter.

[220] Besides, as among these questions, if there are any that are firmly connected with the circumstances of fact, there are others, on the other hand, that are of a very general nature, and it would thus be well that the Convention, with regard to these latter, should contain some principles easily applicable, from which the parties might, of course, derogate, but to which they might also merely refer in their *compromis*.

With special regard to procedure, it would be advantageous to do this.

In this matter as well as in that of arbitration, experience proves that we run the danger of singularly increasing the difficulties of a *compromis*, by adding to it the necessity to determine in it the rules of procedure to be followed. From such a state of things it will often result that the *compromis* will in its turn refer to the commission of inquiry itself, and this second reference presents no less inconvenience than the first. If the inquiring commissioners are not jurists, they run the danger of meeting serious difficulties. If they are jurists it will be a great waste of time for them. At all events, and while recognizing that for the fixation of the details of functioning which depends primarily on the circumstances of the case it is necessary that the Commission should possess sufficient competence, one may think that it might often be dangerous for it to adopt solutions of principle with a view to regulating a particular case.

Among the questions susceptible of being thus foreseen by the Convention, it seems necessary to point to:—the rôle of each of the parties before the commission of inquiry and their means of defending their rights and interests before it—the receiving of testimony and especially of testimony by witnesses, with the guarantees of veracity necessary in the case—the publicity of the inquiry which, if imprudently admitted, runs the danger of interfering with the establishment of the truth and of exciting the minds instead of calming them—the method of procedure—the settlement of the expenses.

By adopting some general rules upon these various points, to ensure the hearing of both sides, the fairness, the independence and impartiality of the inquiry, combined at the same time with the flexibility and prudence required by the independence and political sovereignty of the parties, your commission would happily complete the work of 1899.

The improvements that we propose to you along this line have no other object, as you see, than that of facilitating the functioning of the existing institution, refraining from injuriously affecting its general characters as they have been formulated by your predecessors.

They are prompted by the thought of permitting the international commissions of inquiry to be, in any hypothetical case, a means easily accessible for insuring the peace between the nations.

It is in this spirit that we do not want to modify Article 1.[1]

[1] Retention of the present Article 9 of the Convention of 1899.

This article contains the definition of the general characteristics as well as the mission and the rôle of the international commissions of inquiry.

What, in the first place, are these general characteristics? According to the present Article 9, the commissions of inquiry constitute *optional* institutions.

The proposition of giving to them an obligatory character has been defeated in the First Conference. No new and sufficient reason has seemed to us to require a modification in this respect. It will devolve upon you to decide those that may be submitted to you. On the other hand, the commissions of inquiry constitute *arbitral* institutions [1] in this sense, that they are institutions voluntarily constituted by agreement or special *compromis* in view of a definite case, [221] and deriving their existence, their authorities and their competence only from the mutual will of the interested parties.

In this respect also nothing has seemed to us at present to necessitate a modification of the text in force.

Finally, the general object of a commission of inquiry, as indicated by the title itself of the Convention, is as much to smooth over a dispute between States as of giving judicially a solution in conformity with abstract, theoretical principles.

This character, it has seemed to us ought carefully to be retained in the same way as the rest.

In the second place, what are the mission and the rôle of the commissions of inquiry? By the terms of the present text, their rôle is to elucidate "the questions of fact by an impartial and conscientious examination;" and the Convention (*present Article 14*) adds that the report is in no way of the nature of a decision.

We are, therefore, dealing in principle with a mission of *investigation*—and not with a *judicial* mission. Outside of the preparatory labors of 1899 this distinction has been set forth on different occasions.

Nevertheless, the wholly optional nature of these institutions, and, on the other hand, the provision of Article 10, paragraph 2, according to which the *compromis* of inquiry leaves entire freedom for fixing the extent of the powers of the commissioners, somewhat relieve the rigidity of the definition and permit, if necessary, the widening of its scope.

Is it proper to specify more precisely either one way or the other? It does not seem so for fear of restricting and rendering use of the institution more difficult.

To admit in principle a judicial mission would be equivalent to provoking unnecessarily an attitude of attack and defense which the facts—for example, a question of frontier limits—can not in themselves imply.

To admit in principle that the Commission will never have anything but a mission to investigate, leads to the opposite extreme.

Experience proves the practical advantages there may be in combining the mission of investigation and the judicial mission and to resort to an institution whose form permits recourse to their essential principle. However hybrid it be in theory, peace finds her advantages in it in practice. The name, the external appearance of a commission of inquiry are of such a nature as to relieve legitimate susceptibilities which the form and the name of a tribunal might, on the contrary, offend.

The Convention of 1899 as it exists in the text of its present Article 9 makes it possible, if necessary, to discover a happy issue for difficult situations.

It would seem regrettable to have this text so modified that in the future

[1] Convention of 1899, Articles 10 and 11.

one could not but encounter new obstacles that would have to be overcome in order to reach that happy issue. Would it not be acting counter to the very purpose pursued by this Second Conference?

His Excellency Mr. **Martens** speaks as follows:

It is for me a great honor and a pleasure to state that on the whole the Russian proposition [1] is in agreement with the French proposition. We are convinced on both sides that the Convention of 1899 has furnished in the commissions of inquiry a practical means for preventing conflicts. Even though differences should appear between the two texts, it will be the work of the committee of examination to have them removed. It is, in fact, merely a matter of phraseology. Upon one matter, however, we slightly differ. The very idea of my project is to do something that, if possible, shall perfect the work of the First Conference, and I believe that we will be rendering a great service by bringing it more within the reach of all, by simplifying procedure, by removing all doubts that might arise with regard to its scope and its general functioning.

[222] To accomplish this it will be necessary to recall the exact object that was assigned in 1899 to the commissions of inquiry. Then we had to foresee the case of a conflict arising on the occasion of a frontier incident or something of an analogous nature.

It frequently happens, at the time when such an incident occurs that we are faced with reports calling for verification, that public susceptibilities are inflamed and that the press arouses public opinion. When such circumstances arise, it was desired to give to the Governments a means to say to that opinion: "Hold on, suspend your judgment, for we, ourselves, need to be enlightened; and for that purpose we are appointing a commission of inquiry that will make its report."

Such then was the idea in creating commissions of inquiry; to put a brake upon the passions, upon misunderstandings. And it is for that reason that in 1899 I stated that the "commissions of inquiry are safety valves" that calm public opinion and permit of gaining time.

This idea has proved itself practical, it has stood the test. In 1905 a commission under the very intelligent direction of Admiral Fournier settled the Hull incident in Paris. The machinery established by the First Hague Conference has functioned quickly and the Russian proposition to have recourse to it anticipated the English proposition to the same end by only a space of two hours. The Second Peace Conference must be unanimous in gratefully recording this result.

The Russian delegation believes, therefore, that it will be useful to develop and to perfect Title III of the Convention of 1899 and not to amend it to its detriment.

Thus, in the first place, we ask that the Powers agree to employ commissions of inquiry, provided their honor is not at stake, provided the circumstances permit such recourse, etc.

We are, therefore, not now dealing with an obligation: we desire merely to recommend vigorously the use of such commissions when such use is found to be possible.

The Russian project foresees, furthermore, that the report must establish

[1] Annex 2.

the responsibilities. This does not mean that the commission of inquiry would become a sort of tribunal. Rather, it is similar to an investigating magistrate: the latter presents the sum and substance of the affair, and from it he sets forth by the force of the things themselves, the responsibilities in the case, but it is not he who establishes them. That is the fundamental distinction to be established as between a commission of inquiry and a court of arbitration, as between a report and a decision.

In the third place, the Russian project contemplates a simplification of the procedure. Entire freedom, this goes without saying, is left with the parties to establish any form of procedure that may be agreeable to them. But, in order that in case of need the commissions of inquiry may operate quickly, it is well to establish in advance some principles of general procedure, since it is essential that time should be gained; there must be a code of rules available, ready and very simple—so as to make it possible to utilize it at once—in case the Powers, whose sovereignty remains intact, decide to apply it.

In the fourth place, the Russian delegation attempts to establish a two-fold bond between the commissions of inquiry and the Hague Court. That the latter may have a proper rôle to fulfill, it is necessary that it be more than a mere list: it must take form; we propose, therefore, that if two commissioners are chosen voluntarily by the parties, the third commissioner be a member of the Hague Court. The second bond would be as follows: when the report is transmitted to the two interested Governments, they must amicably agree upon the basis of this report, or, in case they desire to have recourse to arbitration, go before the Hague Court.

Such is the double tie that we desire to see established between the commissions of inquiry and this Court.

Finally, and in the last place, it seems to me useful to express the wish that the commissions of inquiry should make their investigations, as far as possible, in the very places where the incident which is to be inquired into arose.

[223] In concluding, gentlemen, I permit myself to remind you that upon the pacific and international Hague soil, your predecessors have planted several trees that have more or less taken strong root; the one that grew best is that of the commissions of inquiry. Gentlemen, I ask you to continue the work that is begun and to be as good gardeners for the commissions of inquiry as were your predecessors of 1899. (*Applause.*)

His Excellency Count **Tornielli** makes the following declaration:

In order to retain for the commissions of inquiry the largest freedom of adapting the procedure to be followed to the particular exigencies of each special case, the Italian delegation proposes that the regulation drafted for the generality of the cases be recommended to the commissions of inquiry, but not be made obligatory. If the amendment of the Italian delegation[1] is admitted, the procedure of the international commissions of inquiry would be regulated:

1. by the special conventions existing between the parties;
2. in the absence of special conventions, by the Commission itself;
3. finally, and in a general way, by the regulation that the present Conference proposes to draft and which it would recommend in order to facilitate the task of the Commissions.

In the system proposed by the Italian delegation, one would thus avoid the

[1] Annex 3.

difficulties that might arise in case it were shown that the Commission had departed from the rules of procedure proclaimed by the Conference.

Mr. **de Beaufort** remarks that the proposition of the Netherland delegation [1] bears only upon matters of detail.

In the first place, the delegation concurs in the arguments presented by his Excellency Mr. MARTENS in favor of the new phraseology proposed for Article 9 by the delegation. Without desiring to touch upon the optional nature of the international commissions of inquiry, it would favor its use in all cases where the circumstances might not be opposed to it. This use must be the rule.

The second proposition of the Netherland delegation has for its object to give to the Governments that might establish the commissions of inquiry, the right themselves to decide the choice of languages.

His Excellency Sir **Edward Fry** states that he concurs in the ideas expressed by the French and Italian delegations rather than in those of the Russian delegation. He believes that it is desirable to keep intact the principal provisions of the proposition especially in so far as they concern Article 9. The amendment proposed by the Russian delegation would, under certain conditions, give it an obligatory character, whilst it seems very desirable to have it retain its optional character. Since their establishment in 1899, the international commissions of inquiry have operated but once, and this in the Anglo-Russian [Hull] incident. It proved, it is true, a great success for the institution and a great benefit for peace. We must not compromise it.

His Excellency Sir EDWARD FRY also is opposed to the project of entrusting to the international commissions of inquiry the care of establishing the responsibilities, which would imply a decision upon the questions of right and of morality, whilst the inquiry must confine itself to the establishment of the facts.

The proposition of the British delegation [2] does not contain any important change to the Convention of 1899. Its two principal objects are:

1. previously to fix a date for the exchange of documents in order to remove the necessity of a preliminary meeting of the Commission to that end.
2. to establish a procedure which, in the absence of stipulations to the contrary, might be immediately applied.

[224] He adds that he believes, after a new exchange of views, the French and English propositions might be easily conciliated and fused into one identic text.

His Excellency Mr. **Martens** desires to dissipate a misunderstanding. He does not see that it is possible to find a juridical obligation in the text of Article 9 of the Russian proposition. In the presence of the reservations concerning the honor and independence of the States and of the circumstances of fact, of which the parties remain the sole judges, the very idea of an obligation seems to him excluded from this article.

His Excellency Mr. **Jean Joseph Dalbémar** declares, in the name of the Haitian delegation, that he has nothing to add, for the present, to the considerations accompanying his proposition [3] which have already been distributed.

His Excellency Baron **Marschall von Bieberstein** speaks as follows:

[1] Annex 4.
[2] Annex 5.
[3] Annex 6.

I fully share the view of his Excellency the first delegate of Great Britain; it is desirable to retain Article 9 of the Convention of 1899 without any modification. Our eminent colleague, his Excellency Mr. MARTENS, in stating the reasons that prompted the Russian proposition, has just declared that this proposition in no way contemplates changing the optional character of the commissions of inquiry. It is with great satisfaction that I make note of this declaration. But I fear that the text proposed by the Russian delegation may lead to an interpretation contrary to the intentions of its authors.

The Russian delegation proposes to replace in Article 9 the words "*deem it expedient*" by "*agree.*" This proposition refers to the project which was presented to the Third Commission of the First Peace Conference by the committee of examination. If now the Second Conference accepts a project that was disapproved of by the First, this will be interpreted as a change of real importance. For the term "*the Powers agree*" constitutes, from the juridical point of view, a *juris vinculum,* that is to say, such a formal engagement that, unless the honor or essential interests were at stake, a Power could not refuse to have recourse to a commission of inquiry.

Since we are agreed as to the essential point, as to the retention of the optional character of the commissions of inquiry, we would do well, to my judgment, to abide also by the form of Article 9.

His Excellency Mr. **Beldiman** makes the following declaration:

The royal Government which I have the honor to represent has directed me to express its satisfaction in finding that the proposition presented by the delegations of France and Great Britain, relative to the international commissions of inquiry, retained the purely optional character of this institution and in the exact words that were adopted by the Conference of 1899.

My Government concurs, therefore, fully in the text of Article 9, even as it appears in the French and English propositions, and it could not approve of any modification thereof such as might affect the very essence of that article.

His Excellency **Turkhan Pasha** makes the following declaration:

With regard to the declaration that was made by the order and in the name of its Government upon this matter on July 25, 1899, the Ottoman delegation can but insist upon the principle then and there enunciated, to wit, that recourse to the means specified in the convention for the pacific settlement of international disputes, is purely optional and can in no case assume an obligatory character, and that these means can in no way whatever be applicable to questions
[225] of internal organization; it is in this respect that it believes it to be its duty to insist upon the retention of Article 9 of the Convention of 1899.

His Excellency Mr. **Cléon Rizo Rangabé** reads aloud the following declaration:

The Hellenic delegation is happy in being able to state, after the explanations that have just been given by the authors of the remarkable projects that we have before us, that it is the thought of all not to modify the essential bases established by the First Conference for the international commissions of inquiry and to retain for them their purely optional character. It will devolve upon the Commission to set forth this common view.

In this respect it would, so it seems to us, be desirable to recommend that the text adopted by the First Conference should undergo no modifications that

might suggest the belief that it has been desired to depart from the bases which the commissions of inquiry have been given by present law.

It seems also that in view of facilitating recourse to international commissions of inquiry, it would be important to ensure to these commissions the character that has been attributed to them by the First Conference, to wit, that their rôle should be confined to a simple establishment of facts.

Furthermore, it is under such conditions that we might really hope to see the practice of the commissions of inquiry gain ground in international life, and to render more frequently the precious services which, in their noble aspirations, the initiators of this institution had in view.

His Excellency Mr. **Mérey von Kapos-Mére** declares that the Austro-Hungarian delegation accepts the French proposition, especially as regards the retention of Article 9 in its original text.

He reserves unto himself the right subsequently to propose some modifications of detail with regard to the other articles of Title III of the Convention.

His Excellency Mr. **Milovan Milovanovitch,** delegate of Serbia, also declares for the retention, without modifications, of Article 9, since the proposition of his Excellency Mr. MARTENS, although not contemplating any juridical object, might lead to false interpretations. He states that, even as Mr. MARTENS himself declared but a moment ago, this proposition does in no case render recourse to the commission of inquiry obligatory. But, independent of the uncertainty evidenced by these terms, the fact of substituting a new text for the old would lead to the question: What must be the practical consequences of this change? The inconveniences that would of necessity result would by far outweigh the advantages had in view by his Excellency Mr. MARTENS and which prompted his proposition.

His Excellency Mr. **Ruy Barbosa** delivers the following address:

It seems to me that there is an important, essential difference between Article 1 of the French proposition and Article 9 of the Russian proposition as regards the terms upon which it is sought to establish the engagement that the signatory Powers would contract with regard to the duty or the right of having recourse to the international commissions of inquiry.

According to the proposition of the French delegation,

> the signatory Powers deem it expedient that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry.

According to the proposition of the Russian delegation,

> the signatory Powers agree to institute, if circumstances allow, a commission of inquiry.

Therefore, if we adopt the French text, we are dealing with an advice given or with an indication suggested, in the convention that is to be adopted at
[226] The Hague, by the parties who shall have signed it, to those who by chance might subsequently be in dispute. This suggestion or advice is addressed, even now, in a general form in the text itself of the present convention on the part of the Powers that will sign it, to all the Governments who in future should have to settle any differences whatever with regard to points of fact in the disputes of an international order that involve neither the honor nor the essential interests of the nations.

In adopting the language of the Russian proposition, on the other hand, there is not inserted into the text of the convention which is at present being worked out, either advice or suggestion to the countries that might subsequently be in dispute with regard to these matters. What is apparently being done is to stipulate immediately in the present text between the contracting parties, that, if circumstances permit, recourse will be had in these cases to the commissions of inquiry. Under this form, therefore, and instead of recommending to others, for future eventualities, recourse to the commissions of inquiry, it is agreed, that is to say, an engagement is entered into between the signatory Powers not to disregard this conciliatory remedy except when circumstances should be opposed to it.

The French proposition seems to us, therefore, preferable in this respect, in view of the fact that it does not create an immediate contractual bond between the parties represented at the Conference, but pledges them merely to seek, as far as possible, a means of understanding in this resource the usefulness of which has already been so well recognized through experience.

Still, from another point of view, the French formula seems to us also more advantageous in two important respects. The first point concerns the clause "disputes of an international nature involving neither honor nor independence." Instead of "neither honor nor independence," the French proposition says "neither honor nor vital interests." This last expression seems to us more just than the other. We may imagine hypotheses engaging neither the honor nor the independence but, nevertheless, affecting certain essential interests. The other point relates to the phrase "who may not have been able to come to an agreement by means of diplomacy." The Russian proposition omits this subsidiary proposition which we believe, on the contrary, useful of retention.

His Excellency Mr. **Martens** states that he in no way desires to upset anything that was done in 1899. He believes, nevertheless, that it is the moral duty of the Commission to take a step forward in the direction that seems to him to be that of progress, and not to confine itself to reproducing the text of the articles of the Convention of 1899 with some modifications of detail. "This," he states, "is neither our desire, nor our mandate." His Excellency Mr. MARTENS concludes by stating that there is a general agreement regarding the usefulness of the international commissions of inquiry and leaves it with the future committee of examination and the drafting committee to smooth out the divergences of form.

The **President:** Gentlemen, we may now close this general discussion and adopt a procedure according to which we will successfully expedite our work. In the course of the discussions, reference has already been made to a drafting committee or a committee of examination. The experience of 1899 shows, indeed, that it is advantageous to organize as soon as possible this agency of study and of preparation. Now it is rather divergences of phraseology than of essential ideas that separate us: we have the proof, in the discussion which has just taken place, that these divergences may be removed in the light of a preliminary exchange of views and make room for a common interpretation.

In summarizing our discussion, I am aware of a unanimous agreement to an expression of thanks to the authors of Part III of the Convention of 1899.

Mr. MARTENS must receive a large share of this expression of thanks, nor shall we forget our lamented T. HOLLS who has contributed to this work with
[227] so much efficiency. His compatriots of the United States here present will realize with satisfaction how fresh in the thought and in the heart of all those who knew him, his remembrance has remained. (*Applause.*)

The commissions of inquiry, created eight years ago, have stood the test of time: they have prevented a grave conflict from breaking out and this by simple and loyal processes conformable to the aspirations of our times. Thus, they have increased the confidence of the world in the Hague international jurisdiction.

We are, therefore, all agreed upon this point: what we shall do must *strengthen* the work of 1899; all that might detract from the work accomplished at that time we shall remove. But we are also agreed as to the utility there is in improving certain points of detail such, for instance, as the regulations, the delays, the procedure, etc.

In what respect then do we *seem* to be in disagreement? For the moment upon one sole subject: what is the degree of obligation or right in Article 9? I have the impression from the discussion that has taken place that there is unanimity for the retention of the *optional* character of the Commissions of inquiry, whether it be desired to retain the old text, or whether it be preferred, as Mr. MARTENS seems to view the matter, to modify it slightly. Let me add this: that the formula of 1899 is perhaps less optional than that of Mr. MARTENS. For indeed, as certain jurists think, and among them Mr. RUY BARBOSA, the word "agree," followed by the words "if circumstances allow," gives to the expression a *potestative* character which weakens rather than fortifies the meaning of Article 9. We are, therefore, really agreed, and that which seems to hold us apart is but a matter of phraseology.

In consequence, the previous examination, the phraseology of our various projects are essential things in order to facilitate the happy solution of our labors.

If that is also your way of thinking, gentlemen, I shall propose that you establish even this day your committee of examination. (*Applause.*)

It is, of course, understood that this committee will be competent to deal with the arbitration questions that may subsequently arise, that is to say, with all that relates to the Convention for the pacific settlement of international disputes.

According to the precedents of 1899, the Bureau would, as a matter of course, be a part of this committee. It will include, in consequence, the Vice Presidents of the Commission, Mr. KRIEGE and their Excellencies Mr. RANGABÉ, Mr. POMPILJ and Mr. ESTEVA. (*Approval.*)

Furthermore, we have among us several members of the old committee. It would be an act of courtesy to continue their powers, or, let me say, to extend them. I propose to you, therefore, the names of Messrs. ASSER, LAMMASCH and MARTENS. (*Applause.*)

I shall request Great Britain to give us Sir EDWARD FRY as her representive. (*Approval.*)

In like manner, I request the United States to designate a member of its delegation.

(Mr. JAMES BROWN SCOTT is designated by his Excellency Mr. CHOATE.)

Portugal, finally, would be represented by Mr. D'OLIVEIRA. (*Approval.*)

The committee of examination of the arbitration commission is thus constituted.

In the next meeting of the subcommission, Tuesday next, we shall take up the section on arbitration (*Part IV*).

The meeting closes at 4:45 o'clock.

[228]

FIFTH MEETING

JULY 16, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:15 o'clock.

The minutes of the fourth meeting are adopted.

The **President** has, since the last meeting of the subcommission, received two communications coming from the delegations of Guatemala and Peru. The first [1] contains the texts of arbitration treaties; the second [2] an amendment to the propositions of the United States of America concerning the limitation of the use of force for collecting ordinary debts which arise from contracts.[3]

He requests the secretariat to be good enough to have these two documents printed and distributed.

The PRESIDENT informs the Commission that the delegation of the United States has submitted a new, modified text of its proposition for the collecting of public debts.

This new proposition [4] will take the place of the first, but it came too late to be inserted into the new synoptic list of Chapter I of Part IV.

The PRESIDENT taking up the program of the day, opens the discussion on the modifications proposed to Articles 15 and following of Chapter I of Part IV of the Convention of 1899 for the pacific settlement of international disputes.

He calls the attention of the subcommission to the utility of the new synoptic list [5] prepared by the secretaries of the Commission.

Several members of the subcommission having had themselves entered as desirous to speak in regard to Chapter I of Part IV, the PRESIDENT, before according them the floor in the order of their inscription, proposes to his colleagues to devote the meeting of this day to hearing the general ideas which each orator will no doubt desire to develop in support of his proposition and to reserve the discussion, properly speaking, for a subsequent meeting.

It is so decided.

[229] His Excellency General **Porter** has the floor. He recalls that the delegation of the United States a few weeks ago submitted to the subcommission a proposition concerning the payment of contract debts.[6]

He desires to-day to set forth very briefly its character and scope.

There is a general and growing impression that the employment of armed force to collect unadjusted contract debts from a debtor nation, unless

[1] Annex 67.
[2] Annex 53.
[3] Annex 48.
[4] Annex 50.
[5] Annex 69.
[6] Annex 50.

restricted by some general international agreement, may become the most fruitful source of wars, or at least give rise to frequent blockades, threats of hostilities, and rumors of warlike intentions calculated to interrupt commerce, affect the markets of the world adversely, create a feeling of uneasiness, and disturb not only the countries concerned in the dispute but neutral nations as well.

If the debtor nation resists, war becomes certain.

If so-called "pacific blockades" are undertaken in order to force payments, there is an increasing disposition on the part of neutral commercial nations not to recognize them, and actual war has to be declared to make blockades effective.

Again, there may be other States having claims against the same country that would protest against the arbitrary seizure by a particular creditor of the property of the common debtor.

The case not unfrequently is that of an investor or a speculator who withdraws his services and his money from his own country to risk a venture in another with the sole object of increasing his private fortune.

If he gains millions, his Government does not share in his profits; but if he loses, he demands that it go even to the extent of war to secure sums claimed to be due and often grossly exaggerated.

The onerous rates exacted by a lender confirm the belief that he is assuming an extra hazardous risk.

He not unfrequently purchases in the markets bonds of the debtor State at a low figure, and then makes his demand for payment at par.

In fact he is playing a game in which he expects to have recognized the principle of "Heads I win, tails you lose."

His foreign office, to which he appeals, has, generally speaking, no means at hand to make a thorough investigation of the subject, to procure and examine all the necessary documents, to inform itself as to the opposing evidence and form a correct judgment of the true merits of the case.

It has no jury to ascertain the facts, no competent and impartial court to guide it as to the law, no tribunal to pronounce upon the equity of the claim. In giving a decision the minister of foreign affairs must feel that he is violating a primary principle of the administration of justice in admitting that a case may be adjudged solely by one of the parties to the controversy.

If by so serious a means as that of armed force the amount of the claim be secured, the taxpayers of the coercing nations have to bear the expense of enriching an investor or a speculator who has taken his chance of gain or loss in a foreign land, even if the cost of collection amounts to a hundred times the amount of his claim.

Perhaps there are no subjects which confront a foreign office that are more annoying and embarrassing than the pecuniary claims of individual subjects or citizens against a foreign government, stated at their own valuation and
[230] pressed for payment even though this may entail the formidable question of an act of war. If it were made known that investors and speculators undertaking financial negotiations with a foreign government were expected to deal upon the principle of *caveat emptor*, or if it were understood at least that their home government would not proceed to a compulsory enforcement of their

claims until such claims had been adjudicated and their true value ascertained by a competent court of arbitration, and that the debtor nation had then arbitrarily refused to abide by the award, foreign offices would be relieved of one of the most vexatious and perplexing of their duties.

History records the fact that the great majority of such demands exhibit an exaggeration in the amounts claimed that is positively amazing.

Statistics show that in the last sixty years mixed commissions and courts of arbitration have examined thirteen large claims for damages, indemnities, unpaid contract debts, etc., alleged to be due to subjects or citizens of one country by the Government of another country. The greatest sum allowed in any case was only 80 per cent of the claim, while in some cases the lowest fell to the ridiculous figure of three-fourths of 1 per cent.

On one occasion, one of our citizens having made a contract with a foreign government to perform certain services for it, difficulties arose in regard to the carrying out of said contract and it was annulled. The contractor took advantage of this to demand an indemnity of about $90,000, which was refused. He succeeded in persuading the United States Government to take up his case, and, after much correspondence, many conferences and tedious negotiations, to send finally a fleet of nineteen war-ships to support his claim. At last, after sixteen years of effort, our Government, without succeeding in collecting a single cent, had spent more than $2,500,000 to achieve this result.

We consider this lesson not only instructive, but expensive. To use a familiar expression, "The game was not worth the candle."

It sometimes happens that the citizens of one Power succeed in persuading their Government to send a fleet to coerce another Government, by reason of a default in the payment of interest on securities held by them. The knowledge of such a step causes a rise in the market. The holders take advantage of this to sell their securities abroad at a profit, so that after the claimant power has gone to the trouble and expense of forcing a payment, the benefit goes principally to foreigners.

These examples alone should forever deter civilized nations from resorting to arbitrary coercive measures for the enforcement of a foreign debt (that is, a contract debt) which has not been previously sanctioned by an impartial tribunal.

Such coercive measures are analogous to the practice formerly in vogue of imprisoning individuals for debt, except that no such action could be taken against the debtor until a competent tribunal had first granted a legal judgment in favor of the creditor. As the prisoner's maintenance became a charge upon the State, and his seclusion prevented him from earning any money with which to pay his debts, and even from providing for his family, so the blockading of a debtor nation's port and the destruction of its property by hostile fleets or armies interrupts foreign commerce, deprives it of its revenues from customs, and compels it, perhaps, to incur the expense of resisting force by force. This only serves to diminish its means of paying its debts.

[231] The imprisonment of individuals for debt came to be regarded as illogical, cruel and inefficacious, and has been generally abolished. The analogous practice of nations in the treatment of a debtor State should likewise be abandoned.

Coercive collections may result in enforcing payment at once, when the debtor nation may have so suffered from insurrections, revolutions, loss of crops, floods, earthquakes or other calamities beyond its power of prevention, that it has no means of making immediate payment but could meet all its obligations if given a reasonable time. There are instances of a number of States that, in the past, were at times unable to pay their debts when due, but which, when accorded reasonable time, eventually met all their obligations with interest and are now enjoying a high credit in the family of nations.

Neither the prestige nor the honor of a State can be considered at stake in refusing to enforce by coercive action the payment of a contract debt due or claimed to be due to one of its subjects or citizens by another nation. There is no inherent right on their part to have a private contract converted into a national obligation. If so, it would be practically equivalent to having the Government guarantee the payment at the outset.

The ablest writers upon international law consider that the State owes no such duty to its citizens or subjects, and that its action in such cases is entirely optional.

While these writers differ as to the expediency of intervention, research shows that a majority are of opinion that there exists no such obligation.

The following citations from the written opinions of eminent statesmen, diplomatists, and jurisconsults are valuable and instructive upon this subject.

Lord PALMERSTON, in 1848, in a circular addressed to the representatives of Great Britain in foreign countries, referring to the unsatisfied claims of British subjects who were holders of public bonds and money securities of foreign States, after asserting that the question as to whether his Government should make the matter the subject of diplomatic negotiations was entirely a matter of discretion and by no means a question of international right, said:

> It has hitherto been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans of foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions.

In 1861 Lord JOHN RUSSELL, in a communication to Sir C. J. WYLIE, wrote:

> It has not been the policy of her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments.

Lord SALISBURY in 1880 announced a similar policy. In a debate in the British Parliament—December, 1902—during the controversy with Venezuela, Mr. BALFOUR, the Prime Minister, said:

I do not deny, in fact I freely admit, that bondholders may occupy an international position which may require international action; but I look
[232] upon such action with the gravest doubt and suspicion, and I doubt whether we have in the past ever gone to war for the bondholders, for those of our countrymen who have lent money to a foreign government; and I confess that I should be very sorry to see that made a practice in this country.

ALEXANDER HAMILTON, in the early days of the Government of the United States, affirmed the same principles, saying:

> Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

In 1871 Mr. FISH, then Secretary of State of the United States, wrote:

> Our long-settled policy and practice has been to decline the formal intervention of the Government except in case of wrong and injury to persons and property such as the common law denominates *torts* and regards as inflicted by force, and not the result of voluntary engagements or contracts.

In 1881 Mr. BLAINE, Secretary of State of the United States, wrote that a person—

> voluntarily entering into a contract with the Government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into, for redress.

In 1885 Mr. BAYARD, then Secretary of State of the United States, wrote in a dispatch on this subject:

> All that our Government undertakes to do, when the claim is merely contractual, is to interpose its good offices; in other words, to ask the attention of the foreign sovereign to the claim; and that is only done when the claim is one susceptible of strong and clear proof.

President ROOSEVELT in 1906 expressed himself upon this subject as follows:

> It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contracts debts due to its citizens by other Governments. We have not considered the use of force for such a purpose consistent with that respect for the independent sovereignty of other members of the family of nations which is the most important principle of international law and the chief protection of weak nations against the oppression of the strong. It seems to us that the practice is injurious in its general effect upon the relations of nations and upon the welfare of weak and disordered States, whose development ought to be encouraged in the interests of civilization; that it offers frequent temptation to bullying and oppression and to unnecessary and unjustifiable warfare. We regret that other Powers, whose opinions and sense of justice we esteem highly, have at times taken a different view and have permitted themselves, though we believe with reluctance, to collect such debts by force. It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of

fraud and wrong-doing or violation of treaties as to justify the use of force. This Government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.

It appears that modern public opinion is decidedly opposed to the collection by force of contract debts. The *American Journal of International Law*, in its first quarterly number of this year, says

> The tendency among publicists is certainly toward the acceptance of the principle of non-intervention as the correct and normal or everyday rule of international law and practice.

Among modern authorities on international law who either deny the right of intervention or accept the principle of non-intervention with or without exceptions, the following may be cited: MARTENS, BONFILS, HEFFTER, WOOLSEY, WILSON and TUCKER, WALKER, DE FLOECKER, LISZT, DESPAGNET, RIVIER, NYS, MÉRIGNHAC, and others.

It is not necessary to recall the early consideration and profound study given to this subject by the Argentine Republic, and the exhaustive discussion of the question and of kindred subjects contained in the writings of the former secretary of state of that country, at present one of our highly esteemed colleagues in this Conference.

The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme and exceptional cases.

Expeditions undertaken for the purpose of recovering debts have seldom been successful. In this age it is assuming a grave responsibility to relegate dis-
[233] puted money claims to the dominion of force instead of law, and substitute the science of destruction for the creative arts of peace.

The principle of non-intervention by force would be of inestimable benefit to all the interested parties. First, to the nation whose subjects or citizens have become creditors of a foreign Government, in that it would be a warning to a certain class of persons, who are too much disposed to speculate on the needs of a weak and embarrassed Government, and count on the authorities of their own country to assure the success of their operations. It would enable the Government to continue its normal relations with the foreign state, avoid incurring its ill-will and suffering perhaps a loss of its commerce. Such an attitude would also save it from all risks of complications with neutral Powers.

Secondly, recognition of this principle would be a real relief to neutrals; for blockades and hostilities seriously threaten their foreign commerce by interrupting all trade.

Thirdly, debtor States would find it to their advantage, for it would be a warning that thereafter money-lenders could only count on the good faith of the Government, the national credit, the justice of local courts, and the economical administration of public affairs, to answer for the success of their transactions. This would relieve such States from the importunities of the speculative adven-

turer who tempts them with the proffer of large loans, which may lead to national extravagance and in the end threaten the seizure of their property and the violation of their sovereignty. The knowledge that all disputed pecuniary claims would be subject to adjudication by an impartial tribunal would be apt to lead prominent bankers and contractors to feel that such claims would be settled promptly without serious disturbance to the administration of the country's public affairs, and without the necessity of assuming the task of prevailing upon their Government to undertake the collection of their claims by force of arms. In such case responsible financial men and institutions abroad would be more likely to negotiate loans and make their terms fair and reasonable. The Permanent Court of Arbitration at The Hague would naturally be given the preference for the settlement of such claims.

One significant feature of this Conference is that for the first time in history the creditor and the debtor nations of the world are brought together in friendly council, and it seems a singularly appropriate occasion for an earnest endeavor to agree upon some rule concerning the treatment of contract debts which may commend itself to all here assembled and result in a general treaty on the subject among the nations represented, in the true interest of world peace. (*Applause.*)

His Excellency Mr. **Asser** makes the following remarks:

Before the meeting of this Conference, the Netherland delegation wondered what improvements might be made in the Convention for the pacific settlement of international disputes, especially with regard to international arbitration.

It came to believe that in two respects the Conference would endeavor to strengthen this institution, in the first place by seeking to extend obligatory arbitration, and then to facilitate procedure or to urge, within the arbitral court itself, the constitution of a really permanent tribunal.

It is a fact that numerous propositions in the one or the other direction [234] have been submitted. All evidenced a desire of their authors to promote the work undertaken in 1899.

What, under the very skillful direction of the illustrious president of this commission, the First Conference accomplished in the interest of international arbitration, represents considerable progress. It is the first milestone in the path of the pacific solution of disputes.

But our Conference would cause a very great disappointment throughout the world if we did not profit by the unique occasion that offers itself in this Parliament where all the civilized nations are represented, to promote the cause which is dear to all of us.

Along this line of thought we have been wondering what we may of right expect from this Conference in respect to the matter under discussion.

As regards obligatory arbitration, we must remember that at the time of the First Conference, the committee of examination of this commission had agreed upon certain classes of disputes in regard to which arbitration should be obligatory, but in view of the fact that the States represented at the Conference had not been able to reach an understanding upon this matter, they confined themselves to reserve in Article 19 of the Convention the conclusion between them of special conventions concerning obligatory arbitration.

We know likewise that this reservation has been applied by many States, and it may be predicted without too much temerity that a large number of these conventions will be concluded in the future.

In these circumstances we have been wondering if a general provision in the convention under discussion which should stipulate arbitration for certain matters, would be of great practical utility. Do not let us forget that between the *special* conventions there exist many wide divergences; some go farther than others. The article of the *general* convention could contain but a *minimum* and although the States remain perfectly free to retain or to adopt a more radical system, we may, nevertheless, wonder if the more restricted provision of the general convention would not be adopted by preference.

It is true—and we are glad to realize that this is so—that in several of the propositions that are laid before us, we find, for a certain number of matters, we no longer meet with the reservation relating to national honor and vital interests.

This reservation seems indeed well calculated to disillusion the friends of arbitration.

By means of it we are taking back with one hand that which we seem to be giving with the other. Since each State is free to decide that which in its judgment should be classed among the *vital interests,* doubt is permitted, especially in view of the fact that we have heard it expressed by a man of the greatest competence, by our distinguished President, at the time when we discussed the commissions of inquiry—if it be still permitted to refer to a real *obligation* from the juridical point of view.

In truth we do not see that for a dispute involving the vital interests of a State one should wish to exclude its settlement by means of arbitration, even if there should result from it the danger or the need of war; that one should prefer to the reasoned decision of a tribunal composed of respectable and impartial judges, rendered after a judicial discussion and a conscientious examination, a solution by arms, by blind force, by the good or evil chances on the battle-field.

The vital interests concern the *life* of the nations: war means the *death* of millions of brave citizens.

The vital interests in our day are generally the interests of an economic nature: war is the destruction by millions and billions of the national capital.

[235] In writing into their conventions upon obligatory arbitration the reservation in question, the Governments cannot be supposed to disregard these truths, but what they mean to say is that they desire to remain free not to submit to arbitration certain disputes which they will perhaps be quite inclined to settle amicably, but without giving, *a priori,* to others, whoever they may be, the right to settle them by themselves.

The Netherlands has not felt these scruples in concluding with Denmark the convention of which you know.

As for the Powers that have not, up to the present time, desired to yield the reservation that I have referred to, they would often be ready to submit to arbitration disputes affecting the vital interests and the national honor.

History furnishes us several examples of this.

But what they do not want is to obligate themselves thereto in advance; and I believe that it would be extremely difficult to operate in the convictions of statesmen that metamorphosis that would be necessary to make them accept really obligatory arbitration treaties.

This, however, I hope will not prevent us from concurring in the propositions that have in view the securing of this result, that is to say, arbitration which is really obligatory, though it were only for certain kinds of disputes.

We believe, however, that the cause of arbitration will be served more efficaciously by the efforts tending to realize in whole or in part the *permanence* of the arbitration court.

I shall never forget the pronounced impression created in 1899 by the address of Sir JULIAN PAUNCEFOTE, the honorable British delegate, who caused us to hear for the first time from the lips of a statesman of that great empire, whom no one will reproach with sacrificing anything too lightly to the illusions of the moment, to hear that eminent diplomat propose the establishment of a permanent court with the mandate of judging disputes between the States.

Russia, faithful to the spirit that inspired her august emperor, did not only support the proposition but presented in her turn a detailed project concerning the organization and the functioning of the court. The committee of examination, full of enthusiasm, endeavored to construct the edifice of this world tribunal.

Good will was not lacking; but circumstances did not then permit of realizing the idea.

Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable specter, or to be more precise yet, it gave us a recorder with a list.

And when two Powers that have a dispute to settle read Article 27, which we owe to the generous initiative of France and when, on the invitation of other Powers that have just fulfilled the *duty* prescribed by that article, they go to The Hague, where, as has been recalled to their minds, the permanent court is open to them—when they then ask to have opened to them the door that gives access to the hall where sits that court, the Secretary General may then, thanks to the munificence of Mr. CARNEGIE, point out to them a magnificent hall, but instead of a court he will present to them a list on which they will find recorded the names of a large number of persons "of known competency in questions of international law, of the highest moral reputation, etc., etc."

Gentlemen, I take the liberty of remarking that even before the creation of the court the parties might just as well have chosen arbitrators mentioned in that list. What, may I ask, has resulted in practice from that beautiful creation of 1899?

[236] Several Powers—we are happy to realize it after the reading of the propositions that has just taken place—seem indeed convinced that the Conference of 1907 must not disband without our being able to say, by applying to our work a well-known historic expression, that the permanent court,—in whole or in part—shall henceforth be a verity.

The Netherland delegation convinced of the utility of such a transformation, but not daring to foresee its realization in a *complete* manner in this Second Conference, had prepared a proposition tending to establish, besides the recorder, a *permanent* committee of procedure, whose members, if the parties so desire, might equally be called upon to decide the dispute itself.

The proposition has not been submitted, because since the beginning of the Conference the latter has been presented with more radical propositions from two great Powers, tending to establish a permanent tribunal for the decision of the disputes themselves. The initiative taken by the Government of the great republic of North America and by Russia is most remarkable. We formulated wishes that, save in modification of details that might be deemed useful, may lead to the desired goal.

It may be said that the idea of a permanent international tribunal has gained ground.

England opposes its establishment for the special jurisdiction of prizes. In her project upon this same matter, Germany has likewise adopted this system, but only for the duration of a war, a matter which in no respect changes the principle: for this principle consists in creating a tribunal entrusted with deciding future disputes. Italy and France will, no doubt, remain faithful to their fine traditions, and the States that have not yet expressed themselves will surely, and while recognizing the difficulties of organization which it will devolve upon us to overcome, endeavor to give their assistance to the initiators of these pacific projects.

The difficulties will be overcome, for in this matter, it is also true that "to wish is to will."

The permanent jurisdiction in prize matters, although a part of the laws of warfare, will no doubt furnish an excellent precedent.

It may even now be anticipated that the Conference will succeed in introducing this international prize jurisdiction along with many other important improvements into the sphere of the laws of warfare. And we have reason to congratulate ourselves for it.

But since we are a peace conference, I hope that we shall not separate without having facilitated the recourse to arbitration both by a revision of the rules of procedure and by the establishment within the arbitration court, of a permanent tribunal with a more or less extended competence. Only the existence of such a tribunal, even without juridical obligation to invoke its decision, will exert an immense moral effect in the interest of justice and of peace. You will remember, gentlemen, how a great monarch, who was not merely a famous general but at the same time a philosopher trained in the French school of the eighteenth century, when on the point of committing an unjust act, was impressed by the exclamation of a mere miller who reminded him "that there were judges in Berlin"; and how "charmed to learn that beneath his sway justice was believed in," he submitted to the miller's suit.

Then, gentlemen, when some day a tribunal truly permanent shall sit here, I believe I may say (and you know I am not a Utopian), even without the signature of arbitration conventions whose utility, moreover, I do not depreciate, it will not be without practical result that the nations shall invoke the famous article inspired by France, an article *of duty*, and shall say to a State on the point of committing an injustice "that there are judges at The Hague." (*Applause.*)

[237] His Excellency Marquis **de Soveral** explains in the following terms the considerations that have induced the Portuguese delegation to submit a rather radical project,[1] in which the principle of obligation is clearly laid down.

In the proposition concerning arbitration that we have submitted, we were,

[1] Annex 19.

in the first place, animated by the thought eloquently formulated by our distinguished President in the inaugural discourse in the meetings of this commission.

> It may appear interesting to ask if the opportune moment has arrived and if it would not be of a considerable moral importance to consolidate by a common engagement the stipulations already concluded separately between the various nations and to consecrate by a common signature clauses in which the signatures of all of us appear already, in fact, for the most of them, two on the one side and two on the other.

Gentlemen, we believe that the opportune moment has assuredly come to consecrate at The Hague a condition of things which since in 1899 has been more and more characterizing international relations. Portugal, which is one of the oldest partisans of arbitration, which has on so many occasions entrusted the safe-guarding of her interests to it, and which had already been one of the first to sign treaties in which the arbitral clause was included has, since 1899, concluded arbitration conventions with Spain, France, Great Britain, Austria-Hungary, Italy, the United States, Switzerland, Sweden, Norway and Denmark.

The formula of the two first articles of our proposition is reproduced from these treaties, with the exception of that with Denmark which contains the obligatory arbitration clause without any restriction whatever. And the third and last article that we are presenting to you is the textual copy of Article 3 of the model arbitration treaty adopted by the London Interparliamentary Conference of 1906. I am not telling you anything that is new when I remind you that the London Conference has only adopted, with some modifications, the article submitted by the Russian delegation, and discussed, amended and voted by the committee of examination of the Arbitration Commission at the time of the First Peace Conference.

Arbitration treaties constitute even now a network comprising a considerable number of States, and among these the greatest Powers. In consecrating here this actual fact we affirm our intention of not stopping on the course we have already gone over. In the first place, we are to give the necessary precision to Article 16 of the Convention of 1899. This article which expressed only a wish, evidently delays our ulterior engagements concerning arbitration. If we were to decline to introduce into its text those modifications which alone will square it with the present condition of international relations, public opinion would not fail to interpret this refusal as a retrograde step in our aspirations, and as a certain proof of the platonic and ineffective character of the obligations to which we have affixed our signatures.

But we have desired to take still another forward step in proposing to you that you accept the principle of obligatory arbitration, without restrictions, for some definite cases. We have purposely refrained from setting up a new enumeration of these cases such as might perhaps give greater consideration to our interests and to our particular conventions. We have preferred to appropriate to ourselves a formula which has been the subject of thoroughgoing discussions in 1899, which since that time has been constantly examined and criticized under all its aspects, and which the London Conference has finally adopted as representing the minimum requirements of an impartial public opinion in this matter.

Are we to restrict it or, on the contrary, are we to extend it? You will

decide and we shall accept your judgment. But, gentlemen, permit me to state that if the arbitration cause is a great cause, we must not permit ourselves
[238] to believe that we will be able to solve it without consenting to the sacrifice of some probably transitory interests, but whose too zealous safeguarding might prevent us from attaining success.

In the consecration of the principle of obligatory arbitration, some may risk losing something, others gaining something. We must not fix our attention upon these possibly ephemeral gains nor upon these possibly unimportant losses. We must not injuriously touch upon our essential interests, but only consider those matters with which we have dealt.

If we really believe that arbitration is a fine means for assuring peace between the nations through justice, if we feel convinced that it will establish more trustful and more equitable relations between the strong and the weak, do not let us hesitate to sacrifice, let me repeat it, for the sake of such a glorious result all that which in our interests or from our special points of view may be regarded as negligible, if we look upon them from on high and examine them not too closely.

The mere fact of the convocation of this Conference by our Governments means that the opinion was held that the moment had come for imparting a new impulse to the cause of peace. Before the world we bear this responsibility. Gentlemen, I am sure that we shall know how to meet it with honor. (*Applause.*)

His Excellency Mr. **Hammarskjöld**, in the name of the Swedish delegation, submits the following considerations:

With regard to international arbitration, the First Peace Conference bound itself, 1st, to recognize it in solemn manner, as the most efficacious and at the same time as the most equitable means of settling disputes, and 2nd, to facilitate its functioning through the organization of a permanent court, as well as through the adoption of certain rules of procedure to be followed before the arbitration tribunals. No one will deny that these labors of the First Conference have been of the highest importance, and this is possibly the part of the task accomplished which has most riveted the attention of the peoples looking with hope to the House in the Woods and ardently desirous of hearing the good message issuing from it. We would, no doubt, have wished for even a greater and more decisive result. But the time was not ripe; there were still experiences to be gone through with, opinions to be prepared, and perhaps even prejudices to be uprooted.

In the course of the years which followed, the idea of arbitration has made tremendous progress. The Governments and the nations have shown an ever increasing confidence in this institution. Grave and delicate disputes have been settled through arbitration, and the decisions that followed have nowhere produced bitterness of feeling.

And what is even more conclusive, almost all the Governments have hastened to sign arbitration treaties of a more or less general scope. These treaties may now even be counted by tens, and their network, extending from day to day, includes not only small States, but even the great Powers.

Taking into account all these circumstances which are well known to you, the Swedish Government, which is also desirous of contributing its part to the establishment of a stable régime of right and equity in international relations, and resolved to defend, in case of need, its true interests of an ideal or material nature, is wondering if the moment has not arrived to take still another step

which would constitute a considerable progress in the path which it believes to be the path of the future. It has, therefore, directed its delegation to submit to this Conference a proposition relative to obligatory arbitration.[1]

The delegation desires, therefore, to state in the first place that in its opinion, we must not hurry along too fast. Here, as in all else, haste and exaggeration, together with the false idealism which delights in sonorous phrases, are the most dangerous enemies of a durable progress and not subject to disagreeable reactions.

The essential thing seems to us to be to establish, by mutual agreement, the
[239] principle of obligatory arbitration for certain cases of practical importance, even if such cases should at first be but few in number. We may put our signatures—especially in so far as concerns universal treaties—to that which was most authoritatively stated eight years ago:

> In introducing obligatory arbitration into international life, we must exercise extreme prudence not to extend, beyond measure, its sphere of application, in order not to shake the confidence which it may inspire and not to discredit it in the eyes of the Governments and of the peoples.

Above all, we desire to be inspired by the lessons of experience. Now experience shows that in most cases that have been settled through arbitration, pecuniary claims were involved.

Along the same line of thought, we desire to recall that in accordance with the very important treaty that has been signed by seventeen American States and which has been justly called *Pan American,* arbitration is obligatory for pecuniary disputes in general. It is with regard to an obligatory arbitration treaty of this scope that it has been possible to unify the most of the States of the new world, which, it seems, is of good augury for the possibility of a quasi-world treaty.

It is rather generally accepted that an independent State must not be compelled to submit to the decision of others, questions that concern its highest interests. For it would be asking too much if, in the present state of affairs, one should require for matters of this nature submission of the Powers to an arbitration tribunal. The cord which is drawn too taut will break, so the popular adage says. In delimiting the sphere of obligatory arbitration we must be careful not to include in it disputes which it would be contrary to legitimate sentiments to surrender to the decision of the arbitral court. In this respect pecuniary controversies do not, as a rule, give rise to misgivings. The obligation to pay an indemnity does not affect sovereignty. It does not imply the necessity either of modifying the legislation or of rescinding the acts of the Government; and it is very rare when the amounts in question are sufficiently important to bring about any financial embarrassment.

One might compare independent States with the families in the ancient Roman law which were likewise sovereign. By reason of this sovereignty "*executio universalis*" was the rule and the courts ordered the payment only for a certain sum. "*Omnis condemnatio est pecuniaria.*"

The principle that we deemed it well to adopt is, no doubt, subject to various applications. The special solutions that we propose are in no way absolute. But we believe that the obligation to have recourse to arbitration in the cases of the first two classes—that is to say, when pecuniary controversies resulting from

[1] Annex 22.

damages are involved, in case the principle of indemnification is recognized by the parties in dispute, or else, in case of pecuniary controversies when the interpretation of conventions of any nature between the parties in dispute is involved —will lead to objections only on the part of those who might for the moment repudiate the very idea of making obligatory arbitration universal. The introduction of the third class—pecuniary controversies resulting from acts of war, of civil war, or of the so-called pacific blockade, of the imprisonment of foreigners, or of the seizure of their goods—would be of manifest utility, since such acts will not be especially provided for by all the treaties between one State and another State; in a universal treaty, hypotheses cannot hurt the feelings of anyone. We recall that the legitimacy of acts of war or other similar acts, has just been submitted to arbitral judgment both in the Samoan question and in another recent case. The same applies to the seizure within the Ochotsk Sea or the neighboring waters, of certain fishing vessels. This Conference has even considered instituting an international court charged with high jurisdiction in maritime prize matters.

[240] It is self-evident that in our intention, the proposed provisions must not derogate from the *compromis* clauses nor from the arbitration treaties that submit other cases to arbitral decision. On the contrary, we hope that the number of such clauses and treaties may be increased

Sweden has already concluded with certain Powers arbitration conventions that reach farther than our present proposition. For what is hardly possible with regard to a universal treaty will betimes, perhaps even frequently, prove easy in the relations between two nations that know one another and that are able to foresee the nature of disputes that might arise between them. In concluding arbitration conventions of a wider scope, the interested States will be the pioneers of universal progress for which we must ever hope.

His Excellency Mr. **Francisco L. de la Barra** submits to the subcommission the following declarations:

Although the generally accepted principles of international law determine the conditions that are necessary to reach diplomatic channels, the Mexican delegation, for the purpose of clearness and precision, has the honor of presenting by way of mere suggestion the following addition [1] to the project presented by the honorable delegates of the United States of America concerning the restriction of the use of force for the collecting of public debts arising from contracts.[2]

After the words: "*through the diplomatic channel,*" to add: "*when it proceeds according to the principles of international law.*"

The Mexican delegation did not mean to take part in this discussion, being content to study the propositions that might be submitted and to cast its vote in favor of the one that might seem most efficacious to do away, without departing from the mutual respect for the rights of the States, with one of the most irritating causes of the dissensions that may arise between them, a cause which, in general, does not involve their vital interests. Nevertheless, in view of the fact that the suggested addition would in its opinion render more clear the proposition of the honorable delegates of the United States, the Mexican delegation has decided to present it to this assembly.

The fact that a State may not interfere in the affairs of another State, unless

[1] Annex 58.
[2] Annex 50.

it be in exceptional circumstances determined by international law, is a natural consequence of the principle of the sovereignty and of the independence of the States.

It is true that the cases of claims of a pecuniary nature on the part of private individuals against a State may be of very diverse character; but fortunately, the principles of positive law are very specific in this respect. It is accepted, for instance, that we cannot reach the diplomatic channels in a definite class of questions until all legal recourses before the national tribunals have been exhausted. It is admitted that denial of justice, that evident bad faith and other violations of international law constitute infractions of a certain gravity against the rules of the relations between one State and another State, that lie outside the scope of those dealt with by the Mexican treaty which we have the honor of communicating to the Conference, and of those which, in accordance with the proposition of the United States, must be submitted to arbitration.

It is the removal of these cases of violation that is contemplated by the words used in the Mexican treaty: "claims of an *exclusively* pecuniary nature" and in the proposition of the United States, "armed conflicts of a *purely* pecuniary origin."

As an agreement upon this matter would present one of the most practical and fine results of the Conference, it is to be desired that after the necessary exchanges of ideas, the Commission may come to approve a definitive project that will give consideration to the propositions that have been presented and to the real interests of the nations. Never has a more beautiful ideal been proposed to statesmen than the confirmation, by their agreements, of the characteristic
[241] fact of contemporaneous civilization, recognized by the men of science, that peace is the normal state of the international society.

To labor to the end that these tendencies should more and more be harmonized with the aspirations of the peoples; to labor, as we see it being done in the Conference, to win, in noble rivalry, the esteem of the whole world, by making the prosperity of each country contribute to the prosperity of the rest, this is to give to the life of international society its true meaning and its true dignity. (*Applause.*)

His Excellency Mr. **Prozor** supports the proposition of the United States in the following words:

The Russian delegation has the honor of supporting the proposition of the delegation of the United States of America.[1] We believe that the application of the arbitration principle to international disputes that might arise in regard to the payment of the contract debts of a State to the nationals of another State, would be in perfect conformity with the ideas of justice and of peace by which the First Hague Conference was animated, and to which the present Conference remains sincerely attached.

In 1899 our Government had already envisaged the case of disputes to which the American project which is now before us relates. One of the explanatory notes annexed to the Russian project for an arbitral code mentions, among the causes of which arbitral justice would most readily take cognizance, "the losses occasioned to a foreign national through the fault of a State." We are happy to see that the path traced at that time seems even now the most direct and the most practicable. Faithful to our point of view of that time, we believe, furthermore,

[1] Annex 50.

that the previous and impartial examination of the basis of the claims arising from a contract may be a useful and practical means of elucidating and defining the rights, the duties and the responsibilities in conflict in each given case, and that by these means we would largely facilitate the satisfactory settlement for all in a controversy that may have arisen. In short, we believe that we are here dealing not only with a matter to be arbitrated, but even with an international inquiry, and that such an inquiry might frequently lead to a direct agreement without there being even any need of having recourse to a tribunal of arbitrators. Finally, preoccupied with the necessity of introducing into the institutions here worked out, the principles of strict equity which may alone strengthen them and render them efficacious, we believe it essential to stipulate that the agreement to be reached shall have no retroactive effect.

Gentlemen, the Russian delegation desires to collaborate in every effort made to render the work of this Conference as fecund as possible. We welcome every contribution along that line. We pay a particular homage to him who comes this day to us from a New World, where the field of public law has for a long time been the object of continued study. This study, we are glad to be able to state, has become even more intensive since the First Peace Conference was established between the two continents, a contact so happily consummated in the present one. The acts of the last two Pan American Congresses are a testimony of it, as well as the collections of treaties offered to the Conference by the delegations of Mexico, of Argentine and of Uruguay.

Let us hope that the proposition of the United States with which we shall have to deal, will make us take a further forward step on the path of progress. Let us hope that the discussions will put into evidence the advantages of this proposition and define the mode of its application, so as to make it sympathetic and agreeable to the representatives of the entire world. (*Applause.*)

His Excellency Mr. **Milovan Milovanovitch** presents in the following words the views of the Serbian delegation:

The proposition[1] that the delegation has had the honor of submitting to the Conference, is based upon the supposition that the first duty of the Con-
[242] ference, the principal reason of its meeting, consists in a search after the means likely to decrease the number of wars. Now, as war is but a violent settlement of disputes between the States, by the use of force, it is quite clear and natural, in order to attain that goal, that the Peace Conference must propose unto itself, to remove as large a number of disputes as possible from such a violent settlement by opening other paths that may assure their pacific settlement in conformity with the ideas of justice, and in accordance with the rules and agreements established in matters of international law. This path has, furthermore, been pursued at the First Peace Conference through the elaboration and the signing of the convention for the settlement of international disputes.

The Convention of 1899 created the international arbitration tribunal by inviting the States to submit to it their disputes. For this was the first step to be taken along that path. In taking it the First Conference fulfilled its duty and deserved well of mankind. The Second Conference has but to continue that work and to mark a new step in advance in that path. And the second step that should mark that new advance can be no other than to give to the international tribunal a judicial authority, properly so called, by defining the cases for which

[1] Annex 18.

its competence imposes itself whenever it is appealed to by an interested State. In a word, the thing to do now is to establish the principle of obligatory arbitration. Otherwise, if we were not yet resolved upon taking this step, we would really be justified in asking if the meeting of the Second Peace Conference had not been premature; for in limiting its sphere of action to accessory questions of arbitral procedure, the Conference might properly be blamed not only for not having marked a progressive step in the development of international law, but also of not having sufficiently taken into account either the clearly manifest tendencies or the progress really accomplished. And to prove the justness of this assertion, it will suffice to mention the numerous arbitration treaties and the even more numerous arbitration clauses in the treaties concluded by all the States.

By including the principle of obligatory arbitration in the convention for the settlement of international disputes, the Serbian proposition has taken into account the reasons and the conditions demanding the limitation of the application of this principle to strictly defined matters. At the time of the First Conference it was desired, by proposing obligatory arbitration, to proceed by the absolute affirmation of the principle, and by adding thereto the exceptions and restrictions. It was thus that the formulas were drafted which, after having proclaimed the principle of obligation, except therefrom the cases in which the essential interests, the independence or the honor of the States might be involved. Remembrance of this has remained fresh in our minds and some propositions submitted to this Conference have assumed the same form. And yet this manner of establishing and of proclaiming the principles, the application of which must be restricted by setting negative limits thereto, meets with serious inconveniences, even in matters of internal law. In matters of international law these inconveniences become essential defects. By its very nature, international law which regulates the relations between sovereignties which recognize no authority above their own, no superior will, is and must remain formalistic. In consequence, the stipulations that determine the rights and the duties between sovereign States must be clear and precise, and this clearness and precision can be realized only through positive formulas. When dealing with the relations between States whose power and authority are unequal, there is nothing more dangerous than to leave undetermined the provisions from which are derived their rights and duties. The risk one would run in such case is to see the duties imposed without any guarantee whatever of being able to benefit by the corresponding rights. This is the first and principal reason for which we favor a positive formula that shall
[243] enumerate restrictively the cases to which the application of obligatory arbitration may extend. The second reason in support of our proposition is that, apart from the matters that involve the independence, the essential interests or the honor of the States, there are others that have caused and will continue in the future to cause disputes between the States, for which, unfortunately, war will remain the sole solution.

Without flattering ourselves, therefore, with the illusion that in the present state of mankind it would be possible, either to do away with all the causes of war, or even to foresee and to enumerate restrictively the reasons for which war may be occasioned, nothing prevents us from determining the cases that may and must be submitted to a pacific settlement. This would certainly contribute toward rendering war less frequent, and it would likewise develop a sentiment of justice in international relations and inspire greater confidence for the principles and the

institutions of international law. It is in these circumstances only that occasions may arise in the future when the States, especially the small States, may say: "There are judges at The Hague!"

One more word before I conclude. Our proposition states the cases to which, in our judgment, obligatory arbitration might even now be applied. It goes without saying that we do not absolutely demand such an enumeration. Let us restrict it if it is thought to be too extended; even better, let us extend it, if it is thought to be too restricted. But what we call for absolutely is that those cases to which obligatory arbitration shall be applied be enumerated restrictively and with precision, so that everyone may realize clearly what rights and what duties result therefrom! (*Applause.*)

Mr. **José Gil Fortoul** reads aloud the following declaration, in the name of the Venezuelan delegation:

The Venezuelan delegation adheres to the principle of non-intervention of the American proposition [1] relating to Article 16 of the Convention of 1899; but it believes it to be its duty even now to state the reservations with which it will take part in the discussions of the various propositions concerning pecuniary claims.

The delegation will hold to the following principles:

With a view to obviating between nations armed conflicts having their source in purely pecuniary questions:

I

It is agreed that the disputes arising from claims of subjects or citizens of one State against another State for violation of contracts shall be submitted to the Permanent Hague Arbitration Court in case the parties themselves should not have stipulated in their contract that any dispute or controversy shall be settled by the courts and in accordance with the laws of the responsible State.

II

It is agreed that recourse shall be had to the Permanent Arbitration Court for the disputes between States in regard to claims for damages and losses not arising from contracts, in case the equity and the amount of the claims should not have been settled through diplomacy nor by the courts of the responsible State.

III

It is agreed that the said claims shall, at all events, be settled by pacific means, without any recourse whatever to coercive measures implying the use of military or naval forces.

[244] Record is made of this declaration of Mr. José Gil Fortoul, and it will be printed and distributed through the care of the secretariat.

Mr. **Belisario Porras,** delegate of Panama, makes the following remarks:

While small and relatively weak, the Republic of Panama does not fear, however, because of its fortunate situation from the geographic point of view, any aggression on the part of the other States, large or small. Moreover it is born rich. Nor will it find itself exposed to contracting debts of any nature whatever. Its revenues, in proportion to its population, are considerable and its riches are well conserved and increase day by day.

[1] Annex 50.

Furthermore, the results to be expected from the interoceanic canal which will cross its territory promise to be immense. These vital interests for the young republic and the grievous experience won by its inhabitants after so much sacrifice of blood and so many fratricidal wars, are a sufficient guarantee that one need never apprehend any revolutions in the new republic. Nor has any foreigner to apprehend any prejudice whatever in becoming interested in the affairs of Panama where there is a very vast field for all activities and for the investment of capital.

But desiring to affirm the principle, this does not prevent the Republic of Panama from desiring, even as so many other countries desire, that the weak and small nations should be guaranteed against aggressions on the part of the stronger Powers. Therefore, convinced that the ideal of general peace cannot be realized through force and violence, but that it may be attained through the application of the principles of equity and of justice, the Republic of Panama, through the intermediary of its delegation to this Conference, and while accepting the American proposition as the one which approaches nearest to the ideal, expresses the desire that the strongest nations come to an agreement by means of a general convention, to the end that in the future coercive means shall no longer be resorted to to collect credits accorded by its compatriots, no matter what the source of the debt.

The **President** states that the list of inscribed orators is exhausted, but he adds that several other members have acquainted him with their desire to take the floor at the next meeting and to explain the general opinion of their delegation before taking up the discussion of the articles of Chapter I of Part IV. He proposes to the subcommission to devote its next meeting to hearing addresses that have been announced.

This proposition is accepted unanimously.

His Excellency Mr. **Beldiman** requests to be permitted to speak upon the determination of the program. He observes that the addresses delivered this day have borne upon two kinds of ideas that are germane, indeed, but distinct: some dealt more particularly with the questions relating to obligatory arbitration, while others consisted particularly in accentuating the views of certain delegations on the propositions relative to the limitation of recourse to force for the collecting of public debts.[1]

The **President** believes that it would be difficult at present to separate the two questions and to give to each of them a distinct discussion, for the reason that they are not analogous but connected; this is so true that we have heard the various speakers that have followed one another envisage them simultaneously. Arguments common to the one and to the other have been and will still be presented here. If it is so, the subcommission might continue to examine together the two questions in its general discussion, with the privilege of separating them afterwards when it reaches the discussion of the articles and at the time when it is to adopt the texts.

[245] The PRESIDENT proposes, therefore, with the consent of the first delegate of Roumania, to leave to the members of the subcommission who are still to take the floor, full freedom to continue this discussion which has permitted each speaker to take up the question in its full extent and to raise the discussion to a level which will do great honor to the Conference. (*Applause.*)

[1] See p. 291 [290].

His Excellency Mr. **David Jayne Hill** desires to retain for the delegation of the United States of America the privilege of presenting and of submitting for discussion its proposition on general arbitration, upon the close of the discussion upon the questions of contract debts.

Record is made of this declaration of Mr. HILL.

The next meeting is fixed for July 18, at 10:50 o'clock in the forenoon.

The meeting closes at 4:40 o'clock.

[246]

SIXTH MEETING

JULY 18, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:45 o'clock.

The minutes of the fifth meeting are adopted.

The **President** declares that the program of the day calls for a continuation of the general discussion of Chapter I of Part IV of the Convention of 1899 for the pacific settlement of international disputes. He yields the floor to the first speaker inscribed.

His Excellency Mr. **Luis M. Drago,** delegate of the Argentine Republic, speaks as follows:

Mr. PRESIDENT: The various projects presented[1] for submitting to arbitration disputes relative to pecuniary claims between States most certainly point, in broad outline, to a very marked tendency toward progress.

All these projects are in agreement with regard to what should be taken, if not in a definitive manner, at least at the start, from the realm of violence and brutal force, from matters which, by their nature, are delicate and complex and in regard to which one could not reach positive conclusions except after a careful and lengthy examination.

It is proper to observe, in the first place, that the claims upon which our discussions bear may be of differing origins which give them different characters and modalities.

At times they may arise from damages sustained by foreign subjects, owing to illegal acts committed either by the Government, or by citizens of the country in which the former happen to reside.

They may also arise from conventions of common law concluded between nationals of the plaintiff State and the authorities of another country. A certain class of a very definite nature is represented by what is called public debt, arising from national loans issued through bonds or securities quoted on the markets as stock exchange securities. I shall have to deal with these separately.

[247] For damages resulting from illegal acts, offenses or quasi-offenses, the establishment of the facts determining the responsibility, as well as the real prejudices and the determination of indemnifying damages, come, on the basis of the law of nations, within the jurisdiction of the courts of the debtor State. The same applies to the conventions between the subjects of a nation and of foreign Governments. In this case we are dealing with purely contractual relations in which the Governments proceed in their quality of juridical persons, in respect of the patrimony of the State, and are subject, like all other corporations or entities, to the laws and provisions of private law.

[1] Annex 48, etc.

The political constitutions of all civilized countries determine, in such case, the procedure to be followed; but a rule universally accepted and applied between sovereign States establishes, that if contracts, quasi-contracts and offenses are involved, all local means should, in general, be exhausted before resorting to diplomacy and its procedure.

There can be no real difficulty in regard to exercising such recourse, because there are everywhere tribunals or courts of claims with the necessary jurisdiction to take cognizance of this sort of litigations.

In the Argentine Republic, as well as in the most of the South American States, the Government may be proceeded against in the courts without any need of securing its consent thereto in advance. In this respect we have gone farther than the United States which is guided in the matter by the principles proclaimed by HAMILTON, one of the authors of the *Federalist*, according to which neither the nation nor the States forming the nation, may be cited before the courts.[1]

We cannot find fault with the illustrious American statesman for having treated of the matter only from the point of view of the internal judicial organization of the United States, in order to affirm that the particular States of the Union should not be cited before the Supreme Court.

But it ought to be borne in mind that Hamilton was writing in 1788 in connection with the project for a constitution for his country, and that he died in 1804. The first national foreign loan bears the date of the year 1820. How could HAMILTON who died sixteen years before that time, deal with such a matter?

The lack of any court of claims and the refusal to constitute such a court, as well as decisions equally contrary to the fundamental laws and principles of right, would constitute what is known in jurisprudence as *"denial of justice"* and would come within the sphere of action of the law of nations, with all the consequences and responsibilities resulting therefrom for the States that disregard the law of nations.

When contrary opinions are formed regarding the correctness and justice of the decision rendered by the courts of the debtor country, and not before, it would be proper to apply the arbitration that all the projects presented have proposed. Such arbitration would have to decide as to the validity of the decision, and, if necessary, as regards the amount of the claim. Finally, only after having exhausted all peaceful means, resort to other measures might be justified, that is to say, recalling the words of the famous dispatch of the Duke of NEWCASTLE:

> in case justice has been absolutely denied, first by the tribunals, and afterwards by the Prince.

As regards foreign loans, by the very reason that they represent a class of obligations entirely apart and distinct from any other obligations, claims to which they give rise must follow a different course. They are put into circulation by virtue of legislative authorization which proceeds directly from national sovereignty and is inseparable from it.

The issue of bonds or public funds, like that of money, is, in fact, a positive manifestation of sovereignty.

[1] Chapter LXXXI.

[248] It is by an act of sovereignty that a State ordains the payment of coupons on maturity, and it is quite obvious that it is by an act of the same character that it determines, in some exceptional cases, the suspension of the payment of the debt. On the other hand, there is no individual creditor who has contracted with the Government; it is an indistinct person, a person unnamed who acquires certificates at their actual market value, which is more or less variable, but bearing always, from the beginning, their risks and their certainties which are indicated by their quotation.

As there exists nowhere a political régime permitting private individuals to summon a Government before its own judges on account of the suspension of the payment of public loans, the denial of justice, that is to say, the inequity of international law which may cause diplomatic intervention, does not manifest itself at first thought.

However that may be, it is certainly a fact that, if the legal distinction between ordinary contracts and loans constituting the public debt were not clearly established, as it is, from the point of view of principles, we might always arrive at this conclusion in a practical manner, since everywhere tribunals exist for the first class, while there are nowhere any to adjudicate the second class.

This being so, we must in the first place consider that when the Government suspends payment of its debt, the foreign owners of the certificates which it has issued incur the same losses as he who invested his money in a private enterprise represented by stock, for instance, in a joint stock company which, afterwards, might get into difficulties. The bearer of State securities, and it is this which constitutes the sole difference, is in a more advantageous position than the owner of stocks, for the State does not disappear, and, sooner or later, becomes solvent, whilst a society that has gone bankrupt goes down forever and without hope of rehabilitation.

If, as is evident, private financial misfortunes suffered by the subjects of a nation in a foreign country do not compromise the progress, existence or happiness of the public at large to which they belong, and do not impose on the latter any duty to protect them, how could a war be justified on the sole ground that these subjects, instead of dealing with private parties, had dealt with the Governments themselves in the hope of realizing a larger and surer profit?

To these reasons there may be added others of considerable weight. The certificates of bonds to the bearer are the object of very active transactions on the financial markets of the world and pass constantly from one hand into another, without any inscription or other formality than the mere transfer. Hence it is impossible that, at the time when it moves to an armed intervention, a State can be sure that it acts in the interest of its nationals. It presents claims in the name of a definite group of certificate bearers. But these certificates rise in value and are sold in large numbers as soon as the news spreads that such a claim is going to be supported by a military expedition. It may, therefore, well happen that when the nations A and B carry out a blockade or a naval demonstration, the greatest part of the securities that these coercive acts mean to safeguard are passed on to subjects of X or of Z.

The case might even arise of a syndicate composed of subjects of a weak nation feigning a transfer of certificates in favor of nationals of a great Power to secure their collection by force, thanks to this collusion which may be very easily carried out.

It likewise happens that the certificates representing the debt of a State are disseminated through various countries, that there may be some of them in France, in England, in Holland, in Germany. If all these Governments [249] should intervene separately to defend the rights of their subjects, and if each of them, as it would have the right to do, should give a different form to its claims and propose distinct arrangements, it can easily be seen what an inextricable confusion there would result, to the prejudice of everyone.

Moreover, and as I have already had occasion to state, in the operations with which I am dealing, one cannot remove risks that are voluntarily accepted by the creditor in view of realizing considerable gains.

Some time ago, Sir HENRY CAMPBELL BANNERMAN said:

> It seems to me that it would not be entirely correct to state that large risks always correspond to large dividends. But one would be very near the truth in affirming, by inverting these two terms, that, in general, large dividends imply large risks. Well now! If all the power of the British Empire were used to back the capitalist, the latter's risk would disappear and the dividends should diminish in the same proportion.

These elements of evaluation and of judgment, and the reflections that the study of the matter suggests, bring us to the conclusion that the suspension of the payment of the debt cannot constitute a *casus belli* between sovereign nations and, hence, nations on an equal footing.

There can be no legitimate war when there is involved no serious matter affecting or of a nature to affect the vital interests, the honor or the legitimate development of a State.

In private relations, homicide in case of legitimate defense may be justified, but this, even in case of self-defense, does not prevent the law from punishing any act exceeding what is strictly necessary to safeguard the life of the person who is the object of the aggression. For the same reason, war is not justifiable in the absence of causes sufficient to endanger or to affect profoundly a nation's destiny, and among these causes can never be placed the non-payment of bond coupons to their eventual holders.

Arbitration is always welcome. It represents a step and a considerable one towards justice. No self-respecting nation can refuse to submit to it, but its effects will necessarily vary in cases of denial of justice and cases connected with loans. The denial of justice, ascertained to exist by arbitration, constitutes a common international law offense which should call for reparation. A denial of justice, like an act of piracy, is a thing which breaks the equilibrium of and endangers the universal community, and for this very reason falls within the immediate domain of international repression as provided for, accepted and applied by the general consent of all nations.

The aspect of matters changes entirely, however, when we consider questions of loans. We have seen that these loans, even as the issuing of coin and of paper tender, are acts of sovereignty, and they must be regarded as such before and after arbitration.

On the other hand, it is particularly difficult to determine in each case the financial situation and the solvency of a debtor country without entering into a careful examination of its administration which, itself, is closely bound to what is most intimate in the political and social organization of the nation.

It may then happen that as a result of a mistake of evaluation, or by any

other impossibility of fact imposed by the circumstances, for the most part unforeseen and variable, the decision might not be carried out. As some projects indicate and others leave it to be understood, shall recourse in such case be had to coercive collecting by means of force?

[250] In that case, we would relegate the problem, we would postpone it, but we would be far from having solved it.

At all events, in accepting this part of the proposition of the United States which appeals to force in order to carry out arbitration decisions that have been disregarded, we would be taking a great step backwards, for we should be recognizing war as a common legal remedy, we should be establishing one more case of legitimate warfare which would be really inconsistent with a peace conference whose very purpose is to remove or at least diminish the causes of war.

The employment of force would always involve a disparity between the offense and the punishment, being accompanied by the same dangers to local sovereignties, by the same inconveniences and injuries to neutral nations, and affording the same excessive protection to cosmopolitan and everchanging bondholders.

In order to execute the award, would the armies and fleets of the creditor nations be set in motion, would troops be landed, territory occupied, customs administered, taxes levied—in a word, would the debtor nation be subjected to the control and government of the creditor nation?

It is certain that violent methods would only increase the financial difficulties of the debtor and perhaps contribute to his total ruin, while, on the other hand, the certain restriction of the credit and the bad opinion entertained of the nation which did not meet its engagements would in themselves be sufficient punishment, and a moral force much more effective than physical force in favor of the creditor.

At all events we cannot accept the doctrine of Lord PALMERSTON on this subject, which our distinguished colleague General PORTER thought it necessary to mention, as being opposed to financial interventions by Governments, and which we South Americans consider particularly dangerous. It is known that Lord PALMERSTON proclaimed, as LORD SALISBURY also did later, the indisputable right to intervene in order to collect debts of English subjects, but he subordinated the act of intervention itself to what he called British and domestic considerations, which may easily become political ones on occasion. Our colleague quoted to us the text of part of the celebrated circular of 1848, according to which it is considered good English policy not to encourage subjects who invest their capital in foreign countries by placing the forces of the empire at their disposal generally. In the same dispatch, however, we read words which clearly explain the thoughts of the minister:

> If the Government of a nation has a right to demand reparation on behalf of any one of its subjects, it cannot be admitted that the right to such reparation is diminished solely because the amount of the injury sustained is greater and because the claim, instead of involving comparatively small sums, comprises a great number of persons with considerable amounts of capital. It is therefore a question which the British Government alone must decide whether the case shall or not be treated diplomatically.

And in order that there may be left not the slightest doubt as to the real meaning of the doctrine of PALMERSTON, we may read what follows on page 286,

Volume VI, of the *International Law Digest,* which, as is well known, is an excellent and very faithful official American publication. It deals with the forcible collecting of certain Spanish bonds of a State loan:

> Lord PALMERSTON admitted the right of the British Government to wage war against Spain for the recovery of this debt, but denied its expedience under the then existing circumstances. "Let no foreign country," so he says, "deceive itself by a false impression either that the British nation or
> [251] the British parliament will forever remain patient under the wrong; or that, if called upon to enforce the rights of the people of England, the government of England will not have ample power and means at its command to obtain justice for them." Lord GEORGE BENTINCK was so well satisfied with the speech of Lord PALMERSTON that he withdrew his motion for an address to Her Majesty to take such steps as she might deem advisable "to secure for the British holders of unpaid Spanish bonds redress from the government of Spain," observing: "After the tone taken by my noble friend I am sure there will be nothing left to be wished for by the Spanish bondholders. In the language of my noble friend, coupled with the course he has adopted upon former occasions as regards the payment of British subjects by Portugal and the South American States, the British holders of Spanish bonds have full security that he will in other cases exercise the same energy, when the proper time arrives to have it exercised, in the case of other subjects of the Crown."

Far be it from my mind to suppose that any of the Powers represented here entertains any scheme of conquest and imperialistic expansion against the weaker nations of America which have no other defense than right and immutable justice.

Nature has been lavish with our countries, however; their mild climate and fertile soil are favorable to all sorts of products and crops. Being of vast extent and having but a small and widely scattered population, they have been in the past and may still be the object of cupidity. It may then happen, not to-day, not to-morrow, but in a more or less remote future, that there will obtain in Europe an irresistible current of opinion capable of forcing the Governments to assume an aggressive attitude contrary to their intentions of the present time.

And it cannot be denied that the permanent control and subjection of peoples could not be brought about more easily, in this hypothetical case, than through the financial interventions which we are trying to prevent for this very reason.

Mr. President, at a memorable time the Argentine Republic proclaimed the doctrine which excludes from the American continent military operations and the occupation of territory having Government loans as their causes.

Although based on very serious and fundamental considerations, the principle here involved is one of policy and of militant policy which cannot be and which we shall not see discussed or voted on in this assembly.

I announce it, nevertheless, in order to reserve it expressly and to declare, in the name of the Argentine delegation, that the latter intends to maintain it as the political doctrine of its country with all the energy manifested in the dispatch sent on December 29, 1902, by our Government to its representative at Washington on the occasion of the Venezuelan episodes.

It is with this reservation, which will be duly recorded and which relates to the public or national debt arising from Government loans, that the Argentine delegation will accept arbitration, thus doing fresh homage to a principle which its country has often endorsed.

His Excellency Mr. **de Villa Urrutia** speaks as follows:

The Spanish delegation adheres to the moderate principles by which the proposition of the United States of America is inspired with regard to the limitation of the use of force for the recovery of public debts, for they are the same principles that have regulated and will always regulate the conduct of the Government of the king.

Spain, since the last Peace Conference, has ardently wished for what is to-day an accomplished fact, that is to say, to have among us the representatives of all the American nations which are sisters to our own both by their [252] language and race, and it would be disposed to accept any proposition which, within the limits of international law before which we are all equals —the great and the small, the strong and the weak—would have for its object to facilitate the legitimate and pacific development of the Spanish-American republics. The doctrine that we have just heard stated by its illustrious author, Dr. DRAGO, does not, as he himself recognizes, come within the scope of our labors and could, therefore, not here rely upon our support; but, by way of a generous protest against the possible abuses of force, it deserves all the sympathies of Spain.

His Excellency Mr. **Crisanto Medina,** first delegate of Nicaragua, seconds in the following words the views just expressed by the delegation of the Argentine Republic:

In the name of the Republic of Nicaragua, I take the floor to insist upon the necessity, on the part of the Peace Conference, to take a definitive stand upon a matter which, to the highest degree, interests all the countries of Latin America, and which is known by the name of an eminent American who is sitting with us.

When I say that this point interests us, I do not mean to refer to an immediate material interest, or even a petty one, such as would be an interest on our part, to evade the fulfillment of a contractual engagement.

The nation that I have the honor of representing has never confronted a situation when the Drago doctrine might have served as a salutary protection for it, for, as almost all the countries of the New World, it has paid its debts with scrupulous regularity and upon the American markets it enjoys absolute confidence.

The interest of which I speak is one of a transcendental nature which can preoccupy only those who, like the plenipotentiaries gathered at The Hague, seek in good faith the means to suppress occasions for conflicts, for rancors and for hatred.

At the time of the inauguration of our labors, the eminent President of the Conference stated in his discourse:

> Let us not forget that nations are living beings, like individuals, and that they have the same passions.

If, therefore, between the peoples, as between individuals, that which most frequently leads to difficulties are the passions of susceptibility and self-love, the first of the things to be done by the peace assembly will be to labor so as to decrease those cases in which a people may feel that it has been wounded in its feelings, in its noble and legitimate self-love, by a more powerful people.

But, I do not want to enter into long considerations and I will confine myself to a brief outline of my proposition.

The honorable delegation of the United States of America has already pre-

sented the proposition [1] with which we are acquainted and which our colleagues of Chile [2] and of the Dominican Republic [3] have amplified.

These amendments, even as the proposition of the United States, are inspired, we all know, by the largest spirit of justice.

But the one and the other, let me state it, lack the frankness of the original idea of Mr. DRAGO, according to which a country may in no case lower itself to the degree where it will employ its army, whose mission is to defend the honor of the nation and the integrity of its territory, in the rôle incumbent upon police officers called sheriffs.

Mr. DRAGO himself has given us the political motives that dictated his immortal dispatch. For my part, I would merely add that this dispatch, and the doctrine which it develops, have been conscientiously studied by the most [253] important body of jurists existing in a country of Spanish speech, that is to say by the Madrid Academy of Jurisprudence, and that this body has given its judgment in the sense of the most complete approval.

It is for this reason that—while accepting the project presented by the delegation of the United States—I state, in the name of my country, the same restrictions and reservations that have been formulated by the delegation of the Argentine Republic.

His Excellency Mr. **Carlin,** in conformity with the instructions of his Government, makes the following declaration:

The Swiss delegation is pleased to recognize that the proposition of the United States of America pursues a highly humanitarian and desirable object, since it tends to restrict the eventuality of future hostilities. But the delegation believes it necessary to state that in Switzerland, in virtue of her laws and international treaties, foreigners enjoy the same protection and the same guarantees of right as the nationals, and that even as the Swiss themselves, with the same facilities and the same certainty of securing an impartial and complete justice, they have to bring before the competent jurisdiction of the country claims for contract debts which they may deem it necessary to formulate against the confederation, a canton or a corporation of public law established within Swiss territory. Hence, the Swiss confederation cannot give its assent to a proposition that, by referring them to an arbitral court, might lead to the invalidation of decisions of national tribunals in regard to controversies in private law coming within their jurisdiction.

It is only in this sense and under these express reservations that the Swiss delegation may eventually take part in the discussion dealing with the proposition of the delegation of the United States of America or with any other proposition of the same nature and of the same scope that might be submitted in the course of our deliberations.

Mr. **Georgios Streit,** in the name of the Hellenic delegation, presents the following considerations:

I ask to be permitted to present likewise some general considerations with regard to Part IV of Chapter I of the Convention that we are discussing.

The preliminary exchange of views, in which the subcommission is now engaged, bears necessarily, in the first place, upon the question whether or not

[1] Annex 50.
[2] Annex 52.
[3] Annex 51.

and in what measure the Convention of 1899 might be modified by adding to it provisions in accordance with which recourse to arbitration would in certain cases be obligatory upon the signatory States.

To the first of these two questions, the speakers who have followed one another to endorse in such a remarkable manner the projects presented by the different delegations have seemed, all of them, to answer in the affirmative; and from the bottom of our hearts, we cannot but approve of all that has been said before this high assembly in order to strengthen the principle of the obligatory recourse to arbitration, and to second the tendencies in that direction that have lately taken such a happy turn.

As to the extent to which this path might be entered into, a rather important divergence of views has appeared. For, when we shall determine by a general convention those cases in which such an obligation shall be assumed, it seems natural that an agreement cannot be easily established. In our opinion it follows, therefore, that it will be necessary to restrict to a considerable extent the scope of the new provision, so as to meet the exigencies of all the States represented in this Conference, and, of necessity, a text will be secured which, compared with that of obligatory arbitration treaties which have been concluded in the
[254] latter years, will leave the impression of a retrograde step in the movement that all of us have welcomed with so much satisfaction.

Hence it may be asked if instead of this small step in advance which we should be able to take, it would not be better to retain even as they were formulated by the First Conference, the fundamental principles in the matter of recourse to arbitration. It is under the rule of present law and under the impulse of Article 19 of the existing convention that arbitration has rapidly gained ground in international life and that a large number of States have concluded between themselves treaties providing for obligatory recourse to arbitration, treaties of greater or lesser range, meeting each time the particular interests of the particular Powers between which they have been negotiated.

No matter how that might be, it would be regrettable if the flexibility of present law were interfered with by substituting in its place a text that should reduce obligatory arbitration to a minimal degree and might possibly check the movement just about to start and which certainly will end by determining in better manner, in the near future, the scope that may be given to a general convention of this nature.

I do not hide from myself that at first thought this argument seems to be against the legitimately impatient sentiments of public opinion. Nevertheless, it is the same spirit that animates it, and which, in order more certainly to attain the proposed goal, demands a certain amount of circumspection; nor need I remind you that as far as Greece is concerned, there exist very ancient traditions in favor of arbitration.

Permit me to refer to the words uttered by a distinguished member of the First Conference, whom we are glad to see among us:

> To desire to hasten the evolution of arbitration would be to compromise the principle of it to which we are all favorably inclined.

Nevertheless, in case this view should not be shared by the high assembly and it were thought useful even now to depart from the existing principles of general law, I would ask to be permitted to draw the attention of the Com-

mission—even as was done by my distinguished teacher and colleague, Mr. Asser, in our preceding meeting—to the work prepared by the committee of examination of the Third Commission at the First Peace Conference, on the basis of the propositions of the imperial Russian Government. The text worked out at that time with the high competence of the members who formed the committee of examination, was presented on July 5, 1899, and figures as the annex to No. 9 of the minutes of the said Commission. It specifies in its Article 10 the cases which, in so far as they do not affect either the vital interests or the national honor of the States, shall be submitted to arbitration. Furthermore, it includes those cases of pecuniary claims resulting from damages in case the principle of indemnification is recognized by the parties, and especially the controversies concerning the interpretation or the application of numerous classes of *general* treaties.

It would seem natural that if it is decided to take the first step in the path of obligatory recourse to arbitration in a general convention we should begin by that large group of conventions which are also general or of a general nature, and that we should apply obligatory arbitration to those classes of treaties which, as has been so well stated in the explanatory note submitted by the imperial Russian Government at the First Conference, "always and necessarily express the concordance of identical and common interests of the international society." These general treaties, better than any others, lend themselves to the general *compromis* clauses; and, the greater the number of such treaties—which would necessarily show an evolution of the law of nations,—the more extended will become the salutary effects.

[255] But for some of the disputes with regard to which this general convention should establish obligatory recourse to arbitration, would it be necessary to suppress the usual clause in accordance with which exception is made to the disputes which, in the opinion of one of the parties to the dispute, affect its honor or its vital interests? I dare to doubt it.

We have before us several interesting projects that have followed this course. Two of them, while maintaining the reservation in the article which establishes a general obligation to have recourse to arbitration for disputes of a juridical nature, suppress it afterwards for certain definite classes of disputes.

It is a formula which, among others, is presented with the full authority of the Interparliamentary Union to which I would not fail to pay the highest homage.

True as it is that the reservation relating to the vital interests and to the honor of the States is of a nature such as will weaken the obligation to resort to arbitration, yet this clause seems still necessary even now for all the classes concerning which obligatory recourse might be established. For it seems that it is frequently the circumstances surrounding a dispute between nations, more than its nature, that deprive this dispute of the possibility of being settled by means of arbitration. And it would seem that as long as an international practice of a certain duration has not indubitably established the existence of the classes for which recourse to arbitration may be stipulated without any exception whatever, it would, nevertheless, be necessary to retain one reservation, the lack of which might compromise the very principle of obligatory arbitration.

Of two things we must choose one; either the classes for which it is proposed to suppress all reservation never give rise to controversies that may involve the

honor or the vital interests, and in such case the reservation is inoffensive and will exercise no particular influence as regards disputes that will be submitted to arbitration; or else there is a possibility, as far distant as can be conceived of, that they will not exclude the idea that even in the said classes, the honor and the vital interests of the States may be involved, and in such case the reservation seems indispensable. In the face of this alternative, it seems preferable not to suppress the clause bearing upon the vital interests and honor of the States.

At all events, by adopting the formula of the Interparliamentary Union as basis for the treaty to be worked out, we would run the risk of considerably reducing the number of disputes in which the right would be withheld of availing ourselves of the clause of the honor and of the vital interests, and thus we would secure a result contrary to that which is desired by everyone. Furthermore, we would create a class of acts whose development in the near future would be looked for in vain. Finally, by specifying certain kinds of treaties regarding which arbitration is absolutely obligatory, reasons would be created for denouncing such treaties, if necessary, or for not concluding new ones, a fact which would not denote progress in international law.

It is better—and this brings us back to our point of departure—to determine the classes of disputes for which, while at the same time retaining the exceptional clause of the honor and of the vital interests, we might even now stipulate the obligation to resort to arbitration. Thus we would create a treaty susceptible of rapid development by the addition of other cases that experience would show might be incorporated therein, and thus, in a sure way, we would be taking this first decisive step in the path of progress.

It is for these reasons that the Hellenic delegation, without formulating a new project, would like to have the text of Article 10 which has been worked [256] out by the committee of examination in 1899 [1] brought in again; it would be ready to accept this text on the condition of the considerations that I have had the honor to present in its name.

We believe that this text might be usefully added to the projects submitted in the matter of obligatory arbitration, and to serve as a basis for the deliberations of the committee of examination established to that end by the present Commission.

The **President**, in order to meet the wishes of Mr. Georgios Streit, states that the text of Article 10 as worked out by the committee of examination of 1899 and at the time submitted to the Third Commission, will be printed and distributed, and afterwards discussed with the amendments proposed to Chapter I of Part IV of the Convention.

Mr. **Lange**, delegate of Norway, speaks as follows:

The Norwegian delegation has received from its Government the most formal instructions to support in the Conference any effort tending to make international arbitration more obligatory and more extended.

It is, therefore, in complete conformity with its duty, when the Norwegian delegation now supports the propositions presented by our honored colleagues from Portugal [2] and from Serbia [3] to the subcommission.

No doubt we are unanimous in here paying tribute to the work of the First Peace Conference. The permanent arbitration court has proven more than its

[1] Annex 68.
[2] Annex 19.
[3] Annex 18.

right to exist; it has proved the right of its creators to the gratitude of the civilized world. But this work calls for a continuation.

Above all, the Second Peace Conference is expected to fill in the gaps left in the Convention of 1899. And all of us know that the most evident of these shortcomings is the absence of any obligation on the part of the signatory States to resort to the arbitration court.

Instead of an obligation, Articles 16 and 19 express but a wish and an intention on the part of the signatory States with a purely moral value.

I do not dispute this value. On the contrary, the series of special arbitral conventions that have been concluded in 1903, 1904 and 1905 are there to prove that within this field also, the Convention of 1899 has been a new point of departure in the development of international relations.

But the assertion cannot be disputed that the conclusion of these treaties cannot remain the last word of evolution. This creation of special law is no longer thoroughly practical. The consequence of this is: the existence of a multitude of diplomatic agencies, conformable with regard to the general outlines but very frequently diverging in the details when one sole universal agency, or at least one general in its bearing, would be greatly preferable.

Furthermore, most of these agreements stipulate only a period of five years and without automatic renewal. The consequence of this is that in a relatively near future several of them will be dead letters if they are not either renewed, or replaced by a general agreement.

Everything seems, therefore, to indicate that "the opportune moment" of which the eminent German jurist, Dr. Zorn, spoke in 1899, has come,—and his words have been recalled to our minds by our honorable President in his inaugural discourse, and again day before yesterday by his Excellency Marquis de Soveral.

> The opportune moment when, after special experiences, obligatory arbitration cases for all may be specified.

The affluence of propositions in this matter, the resolution of the Pan American Congress that has been communicated to us—all these facts are before us to confirm that impression.

The Norwegian delegation would perhaps be prepared to go farther than any of the propositions that have been submitted to the subcommission.
[257] To tell all the truth, these propositions deal only with those cases referred to in general terms in Article 16 of the present act, and in certain ones of these propositions we find reservations and restrictions which it would be regrettable to have adopted in a universal agreement. I mean especially the reservation of the *national honor,* contained in the proposition of the United States of America [1]—a reservation which because of its indefinite character lends itself to a subjective interpretation.

All the propositions that have been presented in connection with Article 16—with the exception of the Serbian proposition—contain the reservation of *vital or essential interests.* It might seem Utopian to endeavor to eliminate this reservation at the present time. Permit me, nevertheless, to call the attention of the subcommission, and especially that of its committee of examinaion, to a provision that may find wide application in arbitration conventions. I refer to

[1] Annex 20.

the right of the arbitral tribunal itself to act upon the matter as to whether or not the dispute comes within the field covered by the arbitral convention.

I find such a provision, in the first place, in the general arbitration treaty concluded between Italy and Peru, and inserted in the very interesting collection of arbitration treaties and arbitration clauses concluded by Italy which has been put before us by the delegation of that nation.[1]

I read in Article 1 of that treaty, dated April 18, 1905:

> The high contracting Parties obligate themselves to submit to arbitration all disputes, of whatever nature, that for any reason whatever may arise between them and that may not have been settled amicably through direct negotiations. From the arbitration *compromis* are alone exempted questions that concern national independence and national honor. In case there should be doubt regarding these two matters, the question shall also be settled by arbitral decision.

A parallel provision is inserted in the arbitral convention between Norway and Sweden concluded during the same year 1905, but a few months later, with this difference, however, that in the latter case it is a divergence relative to the *vital interest* character of the question involved which must be settled by the tribunal itself, a tribunal formed in accordance with the rules of the Hague Convention. Indeed, in the Convention of October 26, 1905, we read:

> ARTICLE 1
>
> The two States engage to submit to the Court of Permanent Arbitration, established by the Convention of July 29, 1899, at The Hague, the disputes that might arise between them, and which might not have been settled by direct diplomatic negotiations, on the condition, however, that they do not involve either the independence, the integrity or the vital interests of the one or of the other of the respective States.
>
> ARTICLE 2
>
> In case of divergence as to whether or not the dispute that may have arisen involves the vital interests of one or other of the States, and for this reason must be included among those that, according to the text of the present article, are excepted from obligatory arbitration, the said divergence shall be submitted to the above-named arbitration court.

Through *the insertion into arbitration agreements* of a provision of this nature there will be afforded for cases of international disputes a sort of safety valve, a time of repose and of reflection which will undoubtedly be important. This will perhaps prove a means for avoiding sudden acts of impulse, and Chauvinistic excitations that have played such a deplorable rôle in international relations.

[258] It is evident that in our Conference the most progressive States, as regards international arbitration, must be prepared to sacrifice a part of their hopes in order to secure the necessary unanimity for a universal agreement. But it goes without saying that the States that have been compelled to submit to this resignation will be entirely free to conclude between them a common obligatory arbitration treaty, and thus to form an arbitral union with a more extended field for the application of arbitration than that afforded by a universal convention. In truth, it is to the formation of such an arbitral union—and one without any

[1] Annex 66.

restriction whatever—to which the well-known arbitration treaty concluded between Denmark and the Netherlands invites. There will not be many States prepared to go that far. A mean term must be found that will afford a minimum of restrictions with a maximum of adhesions on the part of the States.

The creation of such an arbitral union would be a considerable forward step in the present situation when we have such a large number of special treaties, and by the more progressive principles upon which it will be based, it will point to the path for the future.

Mr. **Santiago Pérez Triana,** delegate of Colombia, makes the following remarks:

With respectful silence I have listened to the edifying discussions as to the ways, the systems and the regulations for the extermination of men and the destruction of material things, that is to say, concerning the science of warfare which have for so long occupied the attention of this Peace Conference, proving how difficult is the task of establishing peace between men.

We are now dealing with a question which concerns us of Latin America very deeply. The collection of debts by force necessarily interests the countries of Latin America whose territory is vast and the exploitation of whose natural wealth will continue to demand in the future, as it has in the past, capital which must be sought for abroad and which will be secured in many cases either directly by the Governments of the respective countries, or with their guarantee.

The principle of collection by force can be applied only when the creditor is strong and the debtor is weak. When, as can very well be the case, a creditor is weak in military resources as compared with a great military power which cannot pay its debts the right of forcible collection would become ridiculous.

In the case of debtor nations, it is possible that in spite of the greatest prudence, the Government may find itself wholly unable to meet its financial obligations. This may arise from internal revolutions, from international wars, from the cataclysms of nature which destroy in an incalculable manner the public revenues; it may arise from bad harvests during several successive years, or the sustained or ruinous fall in prices of national products. All this is of exceptional gravity in new countries which, unlike the old countries of Europe, do not possess the wealth accumulated for centuries.

The proposition presented by the delegation of the United States [1] establishes that:

> it is agreed that there cannot be any recourse to a coercive measure involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the claimant and refused or not answered by the debtor State, or until arbitration has taken place and the debtor State has failed to comply with the award made.

It follows from this exposition that the debtor State that may have failed to conform to the decision rendered may be subjected to coercive measures for the collecting of debts which it has contracted and which have been determined by the arbitral decision.

The State finding itself, then, in the situation described will be attacked
[259] by the naval and military forces of its creditor, and a war will commence in which the debtor State shall have been already condemned in advance

[1] Annex 50.

before the conscience of the world, as the author of a war unjustifiable according to its own decision.

In the proposition in question and in all those permitting of the use of force after arbitration means have been exhausted, there is a gap; this gap consists in the fact that we forgot or that we omitted considering the case when, not the lack of will, but the lack of possibility to pay, is involved. We forgot that a State, even as an individual, may be placed in such conditions that, even with the best will, it will find it impossible to meet its pecuniary obligations.

The decision rendered by the arbitral court can neither change the situation of the debtor country nor augment its resources. Yet, according to this decision, the debtor country, being unable to pay its debts, must endure the armed aggression of the créditor, who can bombard its forts and invade its territory. And still the blows will not fall on the guilty or the responsible, but on innocent victims who must bear the burden of all the faults or errors of those who govern them. This indirect method of collecting debts partakes of the methods of the Inquisition; it is no more acceptable, morally, than the application of torment to wring confessions of guilt from innocent lips.

It is certain that in spite of the previous acceptance of the use of coercive measures, the debtor State will defend itself; at the moment of this defensive war for the sacred soil of the native country, its sons will feel that they are in advance warranted to oppose the sword that is ready to cut their throats and the hand that is ready to strangle them.

If a debtor country like ours does not pay the amount of the arbitral decision, it will be because it cannot pay. We cannot, as regards our country, accept the hypothesis of bad faith; we cannot admit accepting an attack upon our integrity and upon our independence as being justifiable by this hypothesis; by its sons and by its representatives the integrity and the sovereignty of a country must be placed beyond all shameful and unworthy supposition, even as in the case of the honor of a man or the sense of modesty of a woman.

I understand perfectly that these ideas are very different from those of creditors. But each one of us speaks here from his own point of view, and with his own arguments. The spirit of Shylock is still almost all powerful in our modern civilization. Once, the insolvent debtor could be sold as a slave or imprisoned at will. We have progressed a little, but Shylock will always continue to demand his pound of flesh and to take it whenever he can. It is his rôle. Now, as Mr. DE BRUNETIÈRE said, I do not accuse, I affirm.

The law in almost all civilized nations has done away with imprisonment for debt. The insolvent debtor retains his freedom. According to the proposition under discussion, the insolvent nation, even in the case of material and obvious impossibility, must submit to being warred against; this means that punishment is meted out against a misfortune, as if misfortune were a crime. In this way we reach monstrous conclusions.

In the case of an individual creditor, the debtor can expect some ray of human charity. But the collective creditor is pitiless; the sentiment of humanity is lost in the collective soul, as smoke is in space: crowds, like water, seek and find their lowest level.

By adopting the idea of the forced recovery of debts, we are attempting to establish, in favor of the international creditor, a condition of preference, by

seeking to do away, in so far as he is concerned, with the case of *force majeure* which is a tacit but obligatory condition of all contracts. If a man loses
[260] his wealth without having had it insured, by shipwreck, fire, or the failure of a corporation, he must be resigned; but here is a demand, on behalf of the creditor finding himself before a State which has no means of paying him, for a recourse to force which will increase with bloody violence the distress of the debtor State.

I take the liberty of calling the attention of my colleagues of Latin America to what I have just stated, and I remind them that acceptance of recourse to force to a given status of the development of events implies an acceptance in advance of the possibility of bad faith on the part of the respective nation, and, as an inevitable and just corollary, leading to the armed aggression against the independence and integrity of the debtor State.

If we adopt the proposition, there will be left to those of us not accepting it, the right to defend our flag, if necessary, without declaration on the part of the representatives of our country, on a solemn and historic occasion, that our country is capable of bad faith. We proclaim the inviolability of the sovereignty of a State, and this is in agreement with the DRAGO doctrine.

It is probable that the gap that exists in the proposition and which disregards the case of the impossibility to pay, may not be a fortuitous gap; it must have arisen from the exigencies of international politics in which absolute truth cannot have its place. I fear that the Peace Conference may, at any minute, come in conflict with this obstacle: for instance, it is to be feared that in the most serious cases arbitration with a view to preventing wars may not be realized because, neither on the one part nor on the other, can the true motives and the real causes of the war be acknowledged.

As regards the arbitral court, we must, all of us, accept it for the determination and the specification of the real debt situation; in the first place, because there is justice in its institution, and then, because experience shows that the exorbitant claims of individual creditors always undergo surprising reductions in favor of the debtors.

The establishment of the recourse to force leads to a new danger for the peace of the world. Adventurous financiers in league with avid Governments will constitute a threatening element: brokers may say to their client: "this bond is absolutely safe. We have our navy and our army at our service to insure its payment."

It is the appeal to force that we reject. You ask, "What shall be done?" I reply, "If you cannot solve the problem satisfactorily and justly, let things take their course." It must be remembered that nations are, so to speak, immortal, and that there is no prescription for national debts. What one generation does not pay, is paid by the next. This Peace Conference, despite the good-will of all its members and the undoubted ability of the illustrious men who preside over its deliberations, cannot work miracles; and it would be a miracle to insure international creditors against all possibilities of loss. And, I venture to say, it would not be a miracle, but a great error to place in the hands of financiers—some of whom are not angels—the means of promoting wars, more or less avowedly imperialistic in their tendencies, against weak nations. From such sparks may spring conflagrations of incalculable import.

I must not conclude without adding that Colombia, my country, has a well-

established credit, that its revenues are visibly increasing, and that Peace reigns over it without cloud or shadow.

His Excellency Mr. **Choate** develops in English, the opinion of the delegation of the United States regarding the principle of obligatory arbitration, [261] in remarks of which he requests Baron D'ESTOURNELLES DE CONSTANT to be kind enough to read for him the following summarized translation.

Baron **d'Estournelles de Constant**: Here, gentlemen, is the French translation or, rather, summary, which his Excellency Mr. CHOATE has kindly handed to the committee.[1]

Mr. PRESIDENT: In presenting our scheme for a general agreement of arbitration among the nations I desire to preface it with a brief statement explanatory of the position of the United States of America upon the subject, in the hope of commending it to the general acceptance of the nations taking part in the Conference.

The dangers which threaten the world from the constant and progressive preparation of all the great nations for war, and from the constantly increasing power and burden of their armaments which were so strikingly portrayed in the rescript of His Imperial Majesty, the Emperor of Russia, of August 24, 1898, and in the circular letter of Count MOURAVIEFF, of January 11, 1899, were mitigated to a certain extent by the excellent work of the First Peace Conference of 1899.

That Conference, it is true, did not see its way to adopt the specific remedy suggested by His Imperial Majesty, but it took a great step forward in providing what it deemed to be the only practical remedy,—in commending arbitration to all the nations of the world as the true method of settling their differences, and establishing a court before which such arbitration might, at the pleasure of the parties, be submitted and decided. The principle of arbitration was firmly established, and it was expressly agreed that in questions of a judicial character, and especially in questions regarding the interpretation or application of international treaties or conventions, it was recognized by the signatory Powers as the most efficacious, and, at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic method. And the establishment of the court of arbitration, as a first step in the plan of carrying arbitration into effective operation among nations, was one of the greatest advances that have yet been made in the cause of civilization and of peace.

But, Mr. PRESIDENT, great events have happened since the close of the First Peace Conference, which have attracted the attention of the world and convinced it of the necessity of taking another long step forward and of making arbitration, as far as human ingenuity can do it, a substitute for war in all possible cases. Two terrible wars have taken place, each productive of an incalculable amount of human suffering and misery, and these wars have been followed by a steady increase of armaments, which offer a convincing proof that the evils and mischiefs which the Russian emperor and Count MOURAVIEFF deplored, are still threatening the peoples of all the countries, and that arbitration is the only loophole of escape from all those evils and mischiefs. So thoroughly have all the nations, great and small, been convinced of this proposition that many of them have made haste to interchange with other individual nations agreements to settle the very questions for which arbitration was recognized by the last Conference as the most efficacious

[1] Mr. CHOATE'S remarks, which in the original *Proceedings* appear in English as an annex to these minutes, are here printed in full. See footnote, *post*, p. 265.

and equitable remedy, by that peaceful method instead of by a resort to war. I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect. In 1904 the United States of America, beholding from a distance the disastrous effects of those terrible conflicts of arms from which they were happily removed, proposed to ten of the leading nations to interchange treaties with them of the same nature and effect. Their proposition was most cordially welcomed and ten treaties were accordingly negotiated and exchanged, but failed of ratification by an internal domestic question which arose between the different branches of the treaty-making powers of the United States. But all parties were of one mind that all the questions for which arbitration had been recommended by the former Conference should be settled by that method rather than by resort to arms, and that the Hague Permanent Court should be the tribunal to which they should be submitted.

[262] In 1901, at the Second International Conference of the American States, held in Mexico, to which the United States was a party, an obligatory convention was entered into and signed by all the parties taking part in the Conference, by which they agreed to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels, when said claims are of sufficient importance to warrant the expenses of arbitration, and that the Hague Tribunal should be the court for the trial and disposition of all such controversies unless otherwise specially agreed. And in case, for any cause whatever, the Permanent Court of The Hague should not be open to one or more of the high contracting parties, they obligated themselves to stipulate in a special treaty the rules under which the tribunal should be established for taking cognizance of the questions to be submitted.

This convention was for five years, and was ratified by eight of the parties, including the United States of America.

Later still, at the Third International Conference of the American States, held at Rio in 1906, for the holding of which this meeting of the Second Conference at The Hague was, by the courtesy of the signatory parties, postponed until the present year, the Mexican treaty was renewed for a further period of five years by all the parties that had ratified it and by all the other countries in the Conference, and is now being ratified by them one after the other.

At the Rio conference the subject of a still further extension of obligatory arbitration was again considered, and at that time all the parties to that conference had been invited to take part in this Second Conference at The Hague. And in view of that fact, and of a general desire on their part to defer to the judgment of this present Conference, the committee to whom the matter was referred, reported a resolution to ratify adherence to the principles of arbitration and, to the end that so high a purpose may be rendered practicable, to recommend to the nations represented that instructions be given their delegates to the Second Conference to be held at The Hague to endeavor to secure by said assemblage of world-wide character the negotiation of a general arbitration convention so effective and definite that, meriting the approval of the civilized world, it shall be accepted and put in force by every nation. The Conference unanimously ratified the report of the committee and the United States was a party to the ratification.

It is under these circumstances that the delegation of the United States of America comes here instructed by its Government to advocate the adoption of a general treaty of arbitration substantially to the tenor and effect of the treaties which it entered into in 1904, to which I have already referred, and which became abortive by the circumstance already mentioned.

Happily, Mr. PRESIDENT, we are encouraged in the presenting of this treaty by your own wise suggestion in the eloquent address with which you opened the first meeting of the First Commission, that, inasmuch as many of the nations had now separately agreed in pairs, one with the other, to the submission of the same questions to arbitration, to be disposed of by the Hague Tribunal, it might now be timely, as well as possible, for them all to enter into the same treaty together and so make this further step forward in the cause of arbitration a world-wide movement. There seems to be no intelligent reason why nations having grave interests at stake which may come into possible difference, and who
[263] have already separately agreed to submit such differences to arbitration before the Hague Tribunal, should not all together agree to exactly the same thing, and why other nations should not follow them in the paths of peace so happily inaugurated.

In conclusion, Mr. PRESIDENT, it is only necessary for me to call the attention of the subcommission to the particular articles of our proposed treaty.

Article 1 provides that differences of a judicial order or relating to the interpretation of treaties, which have not been able to be settled by diplomatic methods, shall be submitted to the Permanent Court of Arbitration at The Hague, always provided that they do not involve vital interests or the independence or honor of either of the States, and that they do not affect the interests of other States not parties to the controversy.

Article 2 provides specifically and expressly what might have been necessarily implied without any such expression, that it shall be for each of the Powers concerned to decide for itself whether its vital interests, or independence, or honor are involved.

Article 3 provides that, in each case that may arise, a special agreement or protocol shall be concluded by the parties in conformity with the constitution or laws of the respective parties determining precisely the subject of the litigation, the extent of the powers of the arbitrators and the procedure and details to be observed in whatever concerns the constitution of the arbitral tribunal.

The form of this article is rendered necessary by the constitutional needs of securing for every such agreement or protocol, before it can become effective, the approval of some other department of the Government besides the one which signs the agreement as a part of the treaty-making power; for instance, in the United States, the Senate of the United States, and, as is believed, other departments of Government in many other States.

Article 4 provides for the ratification of the treaty and its communication to the other signatory Powers.

And Article 5 provides for the effect of a denunciation of the treaty at any time by either of the parties to it.

Thus, Mr. PRESIDENT, we offer a plan by which the Conference may enter into a general convention, which ought to be entirely distinct and independent, for the settlement by arbitration among all the Powers of such questions as shall come within its scope. We believe that it will satisfy a world-wide demand for

such a treaty and will go far to promote the cause of arbitration, which all the nations are every year expecting more and more confidently as a substitute for the terrible arbitrament of war.

At the proper time, Mr. PRESIDENT, I shall ask an opportunity to explain our view of the project we have offered for fortifying the present Permanent Court of Arbitration and building up out of it a tribunal which shall compel the confidence of the nations, and which will be the necessary sequel to the general arbitration agreement which we now offer.

The **President** grants the floor to the speakers in the order in which their are still inscribed under Chapter I of Part IV of the Convention of 1899; he observes, however, that the hour is late and asks the members present if it would not be proper to postpone the continuation of the general discussion to the next meeting. (*Approval.*)

[264] His Excellency Sir **Edward Fry** requests the President to permit him to offer a further statement before the close of the meeting. With the approval of the assembly which grants this request, his Excellency Sir EDWARD FRY speaks as follows:

The delegation of Great Britain gives its support to the proposition of the United States of America introduced by General PORTER. We find it both just and equitable for creditors and debtors alike.

The meeting closes at 12:30 o'clock.

[The annex to this meeting (pages 265-267 of the *Actes et documents*), being the original English text of the remarks of Mr. CHOATE which appear *ante*, pages 262-265, is not printed.]

[268]

SEVENTH MEETING

JULY 23, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:15 o'clock.

The minutes of the sixth meeting are adopted.

The program of the day calls for the general discussion of the modifications proposed to Articles 15 to 19 of the Convention of 1899 for the pacific settlement of international disputes.

The **President** grants the floor to the speakers in the order in which their names have been entered.

His Excellency Mr. **Juan P. Castro,** delegate of Uruguay, makes the following remarks:

Mr. PRESIDENT, GENTLEMEN: I have the honor to state, in the name of the Uruguayan delegation, that—faithful to the instructions received from its Government and to the diplomatic tradition of its country, recorded in several treaties—it adheres to the principle of obligatory arbitration in its broadest form. It is animated by the same sentiments that have been expressed in our last meeting by the distinguished representative of Norway.

Ironists from without this learned assembly will probably say, with a few worthy exceptions, that the partisans of obligatory arbitration are found particularly among the small nations, whence perhaps they will conclude that the tendency in these same countries would perhaps be very different if force were on their side. Well now, this may be so, for such is the imperfection of human nature (which it is our mission to correct), but that which cannot be held in dispute is that the *juris* presumption of seeking to attain the reign of justice, aids the less strong, because in their disputes with the powerful, they can rely only upon reason and right.

Of each of the most important projects, the Uruguayan delegation accepts all that makes them most obligatory, that is to say, without a paradox, most liberal.

Above all, it adheres readily to the American proposition for the establishment of a permanent, a great, an impartial and an influential arbitration court.

With the greatest sympathy it also accepts the propositions of the United
[269] States of America,[1] of Portugal,[2] of Brazil[3] and of Serbia,[4] in so far as they tend to make arbitration obligatory, although it regrets sincerely that the first two named exclude from it, not only the disputes that involve the inde-

[1] Annex 21.
[2] Annex 19.
[3] Annex 23.
[4] Annex 29.

pendence of the peoples in dispute, but even those that concern their "vital interests or their honor," whilst the third excludes all the disputes that involve "the independence, the essential interests and the domestic institutions and laws" of these peoples, thus all three of these propositions leaving it with each country to decide whether or not the differences that may arise are of such a nature that they can be submitted to the decision of the arbitrators. The Uruguayan delegation, in respect of these matters, believes that the Swedish project[1] is more acceptable, as it does not include in the exclusion disputes anent "honor," for might it not be held that when disputes of this order reach a certain degree of acuteness, they involve the honor of both parties?

So that, in the last-mentioned project, the exceptions retained concern "the independence and the vital interests." It is evident that the former should be and always will be—even tacitly—excluded from any *compromis,* for no country worthy of being a country will ever submit its existence to the opinion of arbitrators; but, as regards disputes concerning "vital interests" (which several propositions and even the Convention of 1899 vaguely term "essential interests"), there is no sufficient reason to make an exception of it, because every exception is a gate opening to war.

A boundary question might, in times of stress, be regarded as involving "the essential or vital interests" of two countries, for it would affect the sovereignty that both claim over a part of what they regard as their territory; still, America readily and "*bona fide*" submits such disputes to arbitration, as has been nobly done and for vast territorial areas, by Brazil and the Argentine Republic in one case, and by the Argentine Republic and Chile in another case.

It is proper to add, however, as was recently stated by the illustrious President of the Congress to the students of North America, that the New World is so fortunate as not to be as much divided as the Old World, by differences of race, tradition, history and even religion.

I need not state that the Uruguayan delegation approves of the project of the delegation of the Netherlands, which, according to my interpretation, would make obligatory (by means of the word "agree") a commission of inquiry in all cases of international controversy arising from a difference of opinion regarding matters of fact.

Permit me to add a few words about the various propositions referring especially to disputes of pecuniary origin: for damages occasioned to the nationals of the claimant country for contract debts toward such nationals, or finally, for suspension of the public debt.

It goes without saying that the American,[2] the Chilean, the Portuguese, the Serbian and the Swedish projects can count upon our modest support in so far as they should tend to make arbitration obligatory for claims resulting from damages; nothing can be more just, the more so because as was stated and proven but a few days ago by the American delegate, General PORTER, and confirmed by Mr. MARTENS, upon his high authority, in his book *Par la justice vers la paix,* the most of the claims that diplomacy patronizes, for want of a very difficult control, are revoltingly exaggerated.

Furthermore, the Uruguayan delegation sees no reason for limiting arbitration in this manner, as is proposed by the Swedish proposition, to only those

[1] Annex 22.
[2] Annex 50.

cases in which the principle of indemnification is recognized by the parties in dispute.

The Uruguayan delegation also accepts obligatory arbitration for the contract debts between one State and the nationals of another State.

It must, however, be understood that in the one as well as in the other case there is no derogation from the principle generally admitted in international
[270] law that a State must not intervene in behalf of its nationals before the latter shall have exhausted the legal recourses before the courts of the country from which they claim indemnification.

As regards the proposition of Peru [1] anent the respect of contracts expressly establishing the jurisdiction of the courts of the country, that matter cannot be discussed for the reason that the contract is a law to both parties alike.

The American [2] and the Chilean [3] projects both relate to "contract debts." I understand, therefore, that in these words, the payment of the public debt is not included; this opinion is justified, for the partisans of the DRAGO doctrine could, with its author to whose eloquent remarks we have listened, declare that in such cases "contracts" in the proper sense of the word are not then involved, but simply acts of sovereignty as, for instance, the issuing of coin.

Uruguay with a solid financial system and very considerable annual surpluses in her budgets, having in this question—even as the Argentine Republic—but an indirect interest of American solidarity, would perhaps accept arbitration, even as regards public debt, but it regards as irreproachable this thesis: that the States of Europe must not apply to America any other rules of conduct than those of international jurisprudence which regulate their mutual relations. America is indeed entitled to that treatment because she is thoroughly civilized. I may even add that—with the exception of but a comparatively small territorial part—she is even farther advanced than Europe is aware of, and especially that she progresses with such rapidity as the Old World, arrived almost at the summit of civilization, can realize with difficulty; these words are meant to be accepted as a tribute to Europe which has at all times been our predecessor and is still our guide in the path of progress. But, it is evident, that to sacrifice the principles established by the law of nations is to pay too high a price for the profits that men of venturesome character sometimes endeavor to secure by lending money by means of usurious interest, to some countries whose finances are perpetually unsettled, and that in addition are so unfortunate as to be ill-administered. And this is all the more so because, almost always and without the armed support of their Governments, such capitalists realize great profits, since even their ruined debtors ultimately reimburse them. Young peoples do not perish; sooner or later they will pay what they owe, for it is to their own interest to secure the credit along with the respect of the other nations.

The pacifist ideas and tendencies that I have just dwelt upon are not new in Uruguay. Among the treaties that we have submitted to the consideration of this honorable Conference, there is one concluded with Paraguay in 1883, by which our country cancelled a bill of fifteen million francs with no other object in view than that of giving to that Republic a proof of sincere sympathy and of paying tribute to our American confraternity. But a little time afterwards and

[1] Annex 53.
[2] Annex 50.
[3] Annex 52.

as a logical consequence of the friendly relations strengthened by this international act, a commission dispatched by our Government returned to Paraguay the flags and other trophies which had been taken from her in the struggle which she fought heroically from 1865 to 1868, and this step has become an inexhaustible source of friendship for the two peoples.

The proposition that the Uruguayan delegation has submitted with regard to arbitration and the text of which [1] expresses the main reasons, is related to this tendency. It is more than a proposition; it is a wish. We do not believe that it has any chance whatever of being accepted, and we do not insist upon its being discussed and voted; our delegation has, by means of it, sought to express the complete adhesion of its country to the idea of arbitration, and we desire simply that it be given a place in the records of the Conference. The Uruguayan delegation has thought that, besides the propositions of an immediately practical nature that are likely to lead to slow progress in international legislation,
[271] —a progress which is of real importance, of course, but which could not go beyond what the great States feel inclined to accept—there may be included elaborations of ideas, general plans for an international legislation which would not merely enjoy the authority of the doctrines set forth with more or less brilliance by distinguished writers, but the highest authority of the nations that should adopt them. It is certain that young and sparsely settled countries like ours will not by this means exercise a considerable influence; but if such a plan were supported by one of the great nations that cherish advanced ideas, human aspiration toward peace would perhaps have found a concrete form around which would be grouped all its friends, individuals and peoples.

In consequence, and regretting that I should have claimed some minutes of your very valuable time, permit me to assert the unshakable faith of the Uruguayan delegation in the progress which creates among the peoples the spirit of justice, with the diffusion of public instruction and the tendency toward peace which is so necessary to modern commerce and industry,—a progress that even our collaboration in this Conference proves and which only those superficial minds, led astray by the windings of the path, can deny. (*Applause.*)

Mr. **Francisco Henriquez i Carvajal,** delegate of the Dominican Republic, delivers the following speech:

In the last meeting but one of this subcommission, his Excellency General Porter, in the name of the delegation of the United States of America, has given to us an eloquent definition of the reasons upon which is based the proposition presented by the said delegation relative to the recovery of contract debts between the States. In the historical exposition of the matter he has told us that certain remarkable statesmen as well as eminent internationalists in all countries have refused and still refuse to admit that, for such an object, coercive measures, implying the exercise of armed force, are in practice the most available and in law the most legitimate. A military intervention based upon the international necessity of improving the financial situation of a debtor State and carried out by another State under the pretext of protecting its nationals, may be defended by arguments of a juridical nature, but will never be strictly just.

The proposition of the delegation of the United States of America [2] recognizes and establishes the priority of arbitration as regards the right of each claim-

[1] Annex 47.
[2] Annex 50.

ing State to decide by and for itself the gist of the question. This principle denotes real progress in the relations between the nations, for it permits of illuminating the facts in dispute and of examining the real situation in which the debtor finds himself and the exceptional circumstances that may have created the situation, as well as the reasons that enable him to refuse or to accept either the kind or the quantity of claims.

The first part of this proposition could therefore not give rise to any objections; it comes quite naturally within the scope of the matters which, according to the general meaning which seems already to preside over the direction of the opinions of the Conference, must be included in the arbitration convention, for the disputes of a purely pecuniary origin cannot be included in either one of the three great points, the honor, the independence and the vital interests, that have hitherto been excepted from the principle of arbitration by the majority of the Powers. This remark seems to us so exact that the delegation of the Dominican Republic has reached the conclusion that from the moment when propositions upon arbitration so liberal as those of the delegations of Uruguay, Portugal, Sweden, Brazil, and even that of the delegation of the United States of America are admitted, the American proposition concerning the recovery of contract
[272] debts, in its essential part, which is that of regulating by arbitration the disputes of a pecuniary origin, becomes superfluous. On the other hand, the conditional part of the American proposition states a fact. It does not, in our judgment, establish a rule; it does not deduce a consequence, but merely affirms the situation of the States in dispute before arbitration had been proposed or exercised as the best means of reaching the pacific solution of a controversy between two States, and after all diplomatic resources had been or should have been exhausted.

This fact, which is an actual fact, is that no Power would dispense with the might that it has at its command to support what it believes to be its right. This judgment has ever prevailed between the great Powers and the action resulting from it has never had any other limitation except such as the interests and the necessities of international politics imposed upon it. To subject it to pacific discussion before an international tribunal is, no doubt, a great progress achieved. It is a further guaranty of defense in behalf of the small States, frequently, in very variable circumstances, manhandled by diplomatic pressure. It is important to remark, however, that as in the universality of the other propositions presented respectively by several delegations and relating to arbitration, it in no way involves the exercise of force by one State against another State in case the latter should refuse to submit to the proposed arbitration or to the arbitral decision rendered in regard to one or several of the points referred to in the said propositions or in the articles of the Convention in force; it follows that the conditional part of the American proposition would be out of place and without application whenever the first part of the same proposition, in substance and import, were included and voted in one of the propositions contemplating arbitration generally.

It is possible, however, to consider and accept the American proposition by anticipation as a very exceptional case while waiting until the principle it contains may, in future and through the progressive development of the great questions that are the reason and the object of this Conference, be incorporated in the general doctrine of arbitration. In the presence of this probability which seems strong, the delegation of the Dominican Republic, while accepting the essence

of the American proposition, but nevertheless disposed to vote by preference for the propositions that imply arbitration in a general way, has permitted itself to lay before the high consideration of the Conference some changes [1] in the text of the said proposition.

In the first place, the delegation of the Dominican Republic widens the meaning in which must be considered the question of pecuniary claims supported by the States that exercise their right of protection toward their nationals: such claims arise in practice, either from the particular situation which, from the point of view of its external public debt, the debtor State assumes in certain cases, or from controversies that have arisen in the course of the interpretation and the inexecution of contracts concluded between foreign private individuals and a State, or again from damages and losses sustained in certain circumstances by the nationals of the plaintiff State.

It is a beautiful thought, liberal and fecund, that will in a not distant day be universally accepted, that is to say, the thought that public loans must be subject to no other laws and principles than those controlling the credit of the State. Every State has need of a credit that must be sound, robust, and flourishing. To reestablish it when it has crumbled, it pledges, as soon as circumstances permit it to do so, all its efforts, and, to realize that goal, imposes upon itself the greatest sacrifices. This thesis, brilliantly and powerfully developed, and [273] envisaged from still other view-points by our eminent colleague, Dr. Drago, in a memorable diplomatic note, in the *Revue de droit international public* of Paris and in his last oral communication to this assembly, is in full evidence. And yet, in practice, unfortunately, this consideration has not always been accepted. In spite of the declaration of Lord Palmerston in 1848 and in spite of the learned opinions of publicists, examples are not very rare of powerful States applying the method of force to the settlement of the financial situation of States that are in debt.

With regard to claims of another origin, cases have but too frequently arisen in several countries of Latin America. A difference of interpretation, and, in consequence, the inexecution of contracts existing between the State and foreign industrial companies, are usually their causes. In the text of such contracts the parties frequently agree, for cases of controversies between them, to have recourse to no other jurisdiction than that of the courts of the same State; but this has not prevented the intervention of diplomatic action. In connection with this matter, let me read what Professor Frantz Despagnet says in his treatise on public international law (Paris, 1905, p. 218): "European Powers have too frequently abused their might to extort from the States of Latin America decisions favorable to the claims of their nationals, and frequently out of proportion to the injury that they had actually suffered from the acts of these or of persons for whom these States were responsible. We can easily understand why these countries resist against the abuses of diplomatic claims by which Europeans cause their most excessive exigencies to be urged against them."

While discussing losses and damages, the delegation of the Dominican Republic would not pass silently over the fact that it does not mean to include therein those arising from acts of violence, which a foreigner might in person or in property have sustained on the part of an armed political faction. The Government cannot be responsible for acts committed by such rebellion which it

[1] Annex 51.

represses by force. The nationals have suffered similar damages. It would, therefore, be unjust to grant to the foreigner who dwells within the territory in common with the nationals, a privileged position. A pecuniary reparation arises only in the case of offenses or quasi-offenses that may be imputed to the State through the latter's fault or negligence as regards the protection which it owes to foreigners. The difference of appreciation of the facts may, nevertheless, give rise to diplomatic claims. Ill informed as to the nature and importance of such claims, chancelleries have at times urged some that were excessive or unjust. This is why the delegation of the Dominican Republic believes that it is proper, in the interest of improving the relations between the States and of giving greater influence and value to international justice and more confidence to the small States, to submit without exception, all differences of a pecuniary nature to arbitral decision.

In the last paragraph of its amendment to the American proposition, the delegation of the Dominican Republic has not included the words *" and the guaranty, if there is occasion;"* this is a very vague expression that is the source of serious disquietude.

In concluding the presentation of its reasons, and faithful to the sense of its interpretation of the conditional part of the American proposition, which could in no way be connected with the principle of arbitration, and could even less be its necessary and systematic consequence, the delegation of the Dominican Republic proposes to add after the first paragraph of its amendment or of the American proposition, the following phrase: *" with the exception, however, that such refusal be not formulated in the case of grave circumstances that create a material impossibility of fulfilling it."*

[274] The **President** remarks that the speech of Mr. Francisco Henriquez i Carvajal concludes with the statement of a proposition and declares that this proposition will be printed and distributed.[1]

He then grants the floor to the first delegate of Ecuador.

His Excellency Mr. **Victor Rendón** speaks as follows:

The delegation of the Republic of Ecuador has the honor to declare in the name of its Government, that it will fully concur in all the propositions that aim to establish *obligatory recourse to arbitration tribunals for the pacific settlement of international disputes,* or at least to make their use as frequent as possible by reducing, in so far as may be done, the number of cases that at present are not generally submitted to that high jurisdiction.

The Republic of Ecuador thus remains faithfully devoted to the principles which it has always supported and, in this connection, we take the liberty of recalling that it had the honor, more than nineteen years ago, of securing, for the first time in France, a general arbitration clause in a treaty of amity, commerce and navigation, a treaty which unfortunately was not approved by the French Parliament. During the last twenty years it has concluded many arbitration conventions and signed several *compromis* which designate arbitrators and regulate the procedure to be followed in order to arrive at a pacific settlement of the disputes existing between it and other Powers. At this moment we have a boundary matter that has been submitted to the arbitration of His Majesty the King of Spain.

[1] Annex 51.

We have, therefore, always championed the principle of arbitration and applied it each time it was possible to do so. We would be very happy to contribute in rendering its use habitual, if not obligatory, for the settlement of all international disputes, believing that, if, as has been stated even here, peace is the normal situation between nations, arbitration must be the normal settlement of the disputes arising between them.

His Excellency Mr. **Augusto Matte,** delegate of Chile, has the floor:

Mr. PRESIDENT: I take the liberty, in the name of the delegation of Chile, to present some brief considerations regarding the proposition [1] that we had the honor of putting into text form a few days ago.

This proposition is very simple. It seeks to establish obligatory arbitration for the settlement of any dispute of a pecuniary origin and does not, in consequence, affect either the honor, the sovereignty or the essential interests of a State.

The Chilean delegation does not come here to support what it might regard as being the best doctrine. Profoundly respectful toward the opinion of all, it has confined itself to indicating the conciliatory path of arbitration for certain questions that arise frequently and present at times a very serious character. It is for this reason that our proposition was suggested to us in the spirit of conciliating different tendencies or aspirations.

It is a fact that within the territory of each State there exists a collectivity more or less considerable of foreigners that abandoned their native country to become allied with the social and economic movement of another State.

What is the situation of aliens that have taken up their residence or their domicile in another country?

If we except special conventions, they are, in principle, obliged to submit in all respects to the laws and to the authorities that constitute the political organism of the new State.

But the State to which the alien belongs has, on the other hand, the right and the duty to protect him in his person and his property, each time when in its
[275] opinion he is the victim of an unjustified act. It is a universally accepted principle that when the damage has been caused by private individuals, the alien must seek redress by all legal means that are available to him through the common law, and that diplomatic intervention is justified only in the case of denial of justice.

But the principle is no longer uniformly recognized when, rightly or wrongly, the alien thinks that he has been injured in his interests as the result of a culpable act or negligence of the State itself or of its officials.

There are those who assert that in such cases as well as those other cases aforementioned, one must also seek redress for the damage occasioned before the tribunals of the country, provided that, conformable to the territorial laws, the State may be regarded as a juridical person susceptible of being summoned into court and of being condemned to make good the damage.

There are others who believe that in such cases the protection of the State to which the alien belongs must show itself directly, and that such State must support the claim before the Government to which is attributed the responsibility for the damage.

The Chilean delegation does not pretend to develop or affirm a doctrine on

[1] Annex 52.

this occasion. It confines itself to pointing out that in practice there is no uniformity of ideas, and that, for this reason, there arise frequently controversies that weaken the cordial relations between Governments, when they do not lead even to more dangerous consequences. To avoid such consequences is the object of our proposition. If in advance the obligation to have recourse to arbitration is agreed upon as the final solution of the pecuniary claims, the parties will appeal to such recourse before the dispute has assumed an unfriendly turn. Furthermore, the certainty that an impartial and disinterested arbitrator will have to settle the difficulty in last instance, cannot but influence the disposition of each of the parties, and will cause them to adapt their exigencies and their attitude to what they consider as equitable and just.

The proposition of the Chilean delegation does not merely establish obligatory arbitration for the solution of claims in damages which, wrongly or rightly, are attributed to the fault of a Government, but it includes all other claims of a pecuniary nature, no matter what their denomination and their importance, if they arise from a real or pretended violation, on the part of a Government, of obligations contracted with alien citizens or subjects by that same Government. It is a recognized principle of international law that any person that has entered into a contract with a Government is, for that reason, subject, as regards the effects of such contract, to the territorial jurisdiction of the said Government.

According to this principle, the claims arising from this sort of contracts are to be adjudicated by the courts of the Government against which a claim is lodged; but alongside of this principle, there also exists the right of a State to protect the interests of its nationals; and this right, which is justified to a certain extent, assumes sometimes in practice exaggerated proportions.

If one accepts obligatory arbitration for this kind of claims whenever diplomatic negotiations do not lead to a satisfactory result, one will remove a cause of eminent disturbance of the good relations between the States. The arbitral decision would be a corrective for the States in fulfilling their obligations or deferring them unreasonably. It would also be a corrective for the States that champion the unjust or exaggerated claims of their nationals.

Arbitration would offer a mature solution, a solution resting on cold reason, by removing all pressure incompatible with international courtesy.

It is well understood that any nation that accepts arbitration engages itself to submit in good faith to the arbitral decision. Any violation of this rule [276] would affect the national honor, and the State that would refuse to honor an arbitral sentence rendered with all due regularity would, on the ground of this single fact, forfeit not merely the consideration and the sympathy of the other States, but would also place the adverse party in a better situation for the integral exercise of all its rights in the form that the circumstances might in such case point to.

The proposition of the Chilean delegation tends, moreover, to serve the ideas and aspirations that already rely upon the adhesion of numerous nations. For the representatives of seventeen States met in Congress, signed at Mexico, January 30, 1902, a treaty the main clause of which reads as follows:

> The high contracting Parties agree to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels

and when said claims are of sufficient importance to warrant the expenses of arbitration.

The countries that, on this occasion, evidenced a common desire in signing the pact of which we have just been quoting the fundamental clause are:

The United States of America, Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay.

The proposition of the Chilean delegation, while paying due regard to the thought that prompted the treaty of Mexico, goes even one step further by establishing obligatory arbitration, not only for all claims for loss or damage, but also for those resulting from pretended violations of contracts.

The Chilean delegation considers, in consequence, that the adoption of obligatory arbitration as a means for settling all claims of a pecuniary nature, would prove an important factor in the work of international peace and justice represented by the noble ideal pursued by this Conference.

His Excellency Mr. **Ruy Barbosa** makes the following remarks:

Mr. PRESIDENT: We are not permitted to vote in silence the proposition under discussion. The situation of our country imposes upon us the inevitable necessity of outlining at least the reasons for our vote. I shall, however, do so only in the most thoughtful terms, because I have always in view the sense of responsibility of our position and the delicacy of the subject that we are discussing.[1]

It is almost sixty years since this question arose in the acts of the Governments and in the polemics of the publicists.

The policy of the States in Europe and in America has expressed itself differently with regard to the use of armed forces against insolvent States. Before 1902, Great Britain always refused to interevene. But it has never brought the question within the juridical field. According to the language of Lord PALMERSTON in 1848 in a famous circular document addressed to the representatives of England accredited to foreign cabinets, it was a matter "of simple discretion and not an international question" as to whether such claims would be or would not be admitted as the object of diplomatic negotiations. After Lord PALMERSTON, the British conception did not change either under Lord CLARENDON, under Lord RUSSELL in 1861, under Lord DERBY in 1876, or under Lord SALISBURY in 1882. They reserved unto themselves the right always to consult the circumstances and to reply to the complaints of certificate bearers of foreign debts according to the political inspiration of the day, without ever acknowledging themselves as being bound by any principle of right. The rule of the cabinet of St. James has been that of abstention, with but very few exceptions: those of Mexico, of Egypt, of Venezuela. But in the latter
[277] hypotheses it always denied that the interest of the certificate bearers of foreign debts had borne upon the resolution to intervene.

In the United States the conduct in this matter has been quite different. The Government of Washington has observed, as a principle, the refusal of international pressure against American creditors of foreign States. This results from the words by which Secretary FISH expressed himself in 1871, Secretary BLAINE in 1881 and especially Secretary ROOT in 1906 in the instructions issued to the representatives of the United States to the Pan American Congress of Rio de Janiero. This last document, in recalling the practice established by the

[1] Annex 50.

North American republic in regard to this matter, qualified the use of force for the purpose of collecting such debts when resulting from contractual engagements, as irreconcilable with the independence and the sovereignty of the States. Some contrary examples might be found in the diplomatic history of the United States but they do not change the stability of the almost constant general rule.

We feel indeed that the two ways of looking at the matter are distinct. Whilst England clung to mere proprieties, the United States invoked considerations of right. It is under this aspect that this opinion has made its way into the doctrine, owing especially to the great work of CALVO, whose authority is well known. Therefore, when in December, 1902, it assumed diplomatic form, although in less broad terms, everything was ready for the welcome it generally met with in the two Americas, especially in the United States, whose public press welcomed it most cordially.

But that was not the impression it created in our country. In Brazil, just homage was paid to the Argentine chancellery. No one among our compatriots questioned the generous motives that must have inspired it.

The intervention of the three Powers in Venezuela was in no way approved in our country, and we were thankful to our neighbors for the pride with which they had taken in hand the interests and the independence of the weak countries against the excesses of might. Our friends of the Plata were really not interested in the success of the doctrine whose present celebrity is connected with the name of one of our most esteemed colleagues, Mr. DRAGO, who is as distinguished in letters as he is in politics. It is the people whose honorableness is recognized, a people that has always upheld its credit, and whose progress, as remarkable in its rapid growth as by its glory, assures to it, along with a great future, a financial position inaccessible to the risks of insolvency. It was, therefore, only because of a generous movement of American fraternity and of solidarity toward other States of the same race which were less certain of their position, that the Government of Buenos Aires took the initiative of its eloquent protest.

But while paying homage to the sentiments that had led our kindly and generous neighbor into this path, you will permit me to state, nevertheless, that Brazilian public opinion viewed the question from another angle and expressed itself in a way different from that of our good friends; it has obeyed two sentiments not less respectable nor less American. I must here be its interpreter. Pray, therefore, listen to me with indulgence.

The thesis of the coercive irrecoverableness of the debts of a State, in itself and in relation to the situation of the American States, opens to us different view-points which we should have considered, each in its turn, and which, unfortunately, we have frequently confounded by neglecting to bear in mind the importance of certain considerations, in order to give greater prominence to that of others.

According as we adopt either the one or the other of these different view-points, the juridical view-point, the humanitarian view-point, the moral, the political or the financial view-point, or whether we view them collectively by balancing them according to their relative value, the conclusion to be drawn for the American nations with regard to the consecration of the principle which we have
[278] been endeavoring to introduce into international law, since the Venezuelan case, will be very different.

If we are endeavoring to abolish war, oh, very well and good in that case! We will most heartily join with those who shall offer us the means of transforming this aspiration into law. If we do not propose to go so far, and if we merely think of anticipating executive force by an attempt at conciliation, as is sought in the American proposition, we shall not hesitate to follow you to that extent. But, if in admitting as legitimate other cases of war, we pretend to create a juridical class of absolute immunity for this one, we must then examine and see if your legal arguments are truly irrefutable.

It is very fortunate that in this domain of right we find ourselves in a certain region whither neither the passions nor the interests shall penetrate. Without interests to champion, and without passions, even as those of our honorable colleagues to whom we are already indebted for so much light that they have shed upon this discussion, I shall calmly take up this matter, since the divergence that divides us in the matter, in no way diminishes our esteem, our respect and our sympathy for our opponents. They will, therefore, pardon us for the use of a liberty that our duty imposes upon us and of which we avail ourselves without bitterness, with the sole thought of being able to be useful in the elucidation of a matter which is of the greatest importance for our future.

Reference has been made to the writings of HAMILTON, the great statesman, the great American publicist, to endorse with his words which are of such fascinating authority, the thesis that "the contracts between one nation and the individuals obligate only in accordance with the conscience of sovereignty, and insusceptible of being the object of any force of constraint, confer no right outside that of sovereign will."

Is that true, gentlemen? Is this really a legal axiom? Is it true that sovereignty, in the modern ideas, really constitutes that power without other limitations than those of its own arbitrator? I do not think so. To my mind, it is a dangerous aberration which one is surprised at finding defended by minds so liberal, by democrats so advanced and by friends so enlightened in regard to human progress.

If political sovereignty were that indefinite arbitrator, one could hardly understand that admirable Constitution of the United States which has been the example and the model of almost all American constitutions. The most specific character of that organization does not reside in the federative distribution of sovereignty that balances the local republics within the great national republic. That has been witnessed in other examples of the federative system but that which constitutes the most original and the most commendable trait of this constitution which counts among its most illustrious founders the name of this HAMILTON himself, now invoked by those who place sovereignty above justice, is the fact that in this incomparable work of the men who organized the United States of America, justice has been placed as a sacred limit and as an impassable barrier to sovereignty. To that end they declared rights which sovereignty could not restrict, and they clothed the courts, especially the courts in last instance, the federal courts, with the immense authority of supreme interpreters of the constitution, with the right of examining the acts of sovereignty, even though they were federal laws, and of refusing to enforce them, whenever such decrees, such laws, such formal acts of sovereignty should not respect the rights consecrated by the constitutional declaration.

And this is a first, but already an immense, an immeasurable restriction of

sovereignty which would not be conceded in any other epoch, and which even in our days, in many countries far advanced, one might hold to be incompatible with its very essence. Still, it already exists for an entire continent.

[279] There is, nevertheless, a consequence to this premise which the constitution of the United States has not adopted: that of subjecting the Government, the organic incarnation of sovereignty, to being citable by civil action, to the courts of justice. The idea that then dominated was that of the British law, here born of the Roman law, according to which the Government cannot be cited before the courts unless it consents. That is how one can explain the theory of HAMILTON now invoked, and in accordance with which contracts with the nation establish no right that is susceptible of action in the courts against the will of the sovereign. It is a conception that is observed in the system of several American constitutions, posterior to that of the United States, and under which authority has been conferred upon the courts of justice to take cognizance of the disputes in which the State is summoned as defendant. The State may, therefore, in such matters and in spite of itself, be judged and condemned as a result of contractual obligations, to indemnify the individuals, or to pay to them what it owes them.

What is it then that is lacking in sovereignty to place it in the domain of justice, on the same plane as individuals, in this matter of civil obligations? Solely the seizability of its goods. The State, at least in our country, is prosecuted in justice and made to carry out the decisions of the courts. The plaintiff calls for a copy of the decision, and by means of it, through the judicial power, compels the Government to pay. All there is lacking is execution of seizure.

But in the first place, this exemption does not imply, in so far as the Government is concerned, the right of evading the scope of the decision. On the contrary, at least it is so in our country, the laws in force declare that, if a thing has been adjudicated the executive power can do nothing but submit, and it must open the necessary credits to satisfy the judgment. Undoubtedly, the patrimony of the State can never be seized. But this privilege is not an appanage of sovereignty, since it is also attributed to the provinces and to the communes which are not sovereign. Supposing, however, that it were, is it then inalienable? Is it more essential to sovereignty than those other elements of its primitive integrity which it has relinquished in the most advanced constitutions? And in this sense, would we not be dealing with still another capitulation of sovereignty before the principle of the juridical State?

And, finally, even though the State were not at all to compromise upon this point, and never should yield, will this right which it enjoys in so far as it enacts laws for itself and for its own subjects, subsist in the case of its relations with other States?

It is the first time that between nation and nation, between sovereignty and sovereignty, an appeal has been made to the internal, domestic rule of the non-seizability of the State's goods, to establish the legitimacy of war. War is never considered unjust because the patrimony of a sovereignty is inaccessible to military seizure; what makes wars unjust, is the injustice of their motives.

The thing of importance to know is whether the violation of right practiced by the nation that does not pay its debts is sufficient to authorize against it, from the international view-point, the use of force. That is the question. How are we to solve it?

We do not contest that, if the Government of a country commits a wrong act against the person of an alien or despoils such person of his goods, the State within whose jurisdiction he comes, has the right to protect him, to demand satisfaction, and, in case it is unsuccessful, to secure that satisfaction by the force of arms. Now, is not this fact of the cessation of the payment of the certificates of the public debt of which he is the holder, a case of spoliation against the alien?

A man may have very honestly used all his wealth to acquire securities representing the debt of a foreign State. If the borrower fails to meet his solemn obligations, it means the ruin of all this class of creditors who had used all their means to acquire such securities, because they were justly persuaded that the high character of such a debtor would guarantee them against his bankruptcy; so that, if his patrimony consisted in immovable property set within the
[280] territory of a foreign State, the State to which the individual belongs would have to protect him against confiscation; but if the patrimony of the same individual assumes the form of an investment in foreign bonds, although he were reduced to indigence by refusal to pay them, this duty of protection on the part of the State towards its nationals no longer exists. Where do you find any logic, where do you find any equity in this solution which, moreover, would be imposed as a legal solution?

Of course, the obligation to pay is not denied: it is openly confessed. But one considers himself held to meet that obligation only in so far as according to one's own opinion one possesses the means to do so. But, we are then confronted with scarcely a moral obligation; and it is not a legal obligation. Yet, how can we admit of entering into a contract in a legal form when, in truth, we attain only a moral effect? If there is no sanction for the engagement of him who assumes an obligation, it is quite evident that no contract exists in that case.

In this system, then, a Government certificate would not be a legal agreement, but an act of confidence. In paying the amounts which he lends the capitalist would submit in advance to the arbitrator of the irresponsible borrower. In opening his purse, the lender was perfectly well acquainted with the privileged condition of his future debtor: he knew full well that the latter could not take upon himself the obligation of permitting himself to be proceeded against by way of execution. But truly, the theory once consolidated in law that States in borrowing contract no coercive obligation whatever, that is to say, that their creditors are entirely disarmed towards them, can anyone believe that there would still be capitalists foolish enough to entrust their wealth to such privileged beings?

Others do not deny that payment of their debts is absolutely binding upon the States; what they claim for this class of borrowers is the right to determine the manner and the time of redemption. Now, there exists a palpable inconsequence between these two propositions. He who would be entitled to determine the time for the payment of his debts, might easily evade such time, by postponing it to distant dates, or by delaying it so frequently that the creditors would be entirely deceived in their rights.

It would be of no use to pretend that the honesty and the well-understood interest of the Governments are opposed thereto, and that it would not at all be just to believe them capable of resorting to such means to avoid meeting their

obligations. But in a legal sense, this is not an answer at all, and, in discussing a legal thesis, one can offer only considerations of a legal nature in answer to legal objections. Now, legally speaking, there can be no doubt that, if I am entitled to pay only when in my own opinion I think it proper to do so, I am not exceeding my right by always postponing the moment when I shall pay.

This theory is not the theory of the right of sovereignty; it is the theory of the abuse of sovereignty. Applied in the internal affairs of States, it would nullify the organization of justice, even as it would destroy it if admitted to international dealings.

Neither theory nor jurisprudence has ever admitted in our country this view, which is in our opinion incorrect, as to the position of the State in the matter of loans which it contracts.

In our opinion the State in borrowing does not exercise its sovereignty, but an act of private law, as is the case in so many other contracts in which its personality is divided, that is to say, in which it leaves its juridical sphere to undertake acts of a civil character.

Either these loans are acts of private law, like any other monetary contracts, and do not come within the sphere of sovereignty; or else, if they constitute acts of sovereignty, they are not contracts. But, if they are not contracts, tell the lenders so in advance, when you shall be knocking at their doors; tell it to them openly in the clauses offered for their signatures and in the text of your bond certificates. We shall then see if there will be any subscribers for their investments, or any markets for putting them into circulation.

[281] It has been said that the lender does not advance his money under the form of ordinary *mutuum* contracts: he buys a certificate in the market and that is all there is to it. But isn't it one and the same thing when I am purchasing in the market any commercial stock whatever to bearer?

It has also been said that they do not present the general characteristics of contracts in private law, because they do not express an obligation in favor of a particular person. But, is there not in private law a large class of contracts with unspecified persons?

Finally, it has been said that the using of certificates implies an exercise of sovereignty, because to create them requires legislative authorization. But, is it a fact that other acts of administration or of finance, concessions of public works, for instance, are also and ordinarily effected only in virtue of legislative prescriptions or rights? And could we, perchance, deny to these agreements the civil characteristic of real contracts?

This is our Brazilian jurisprudence; this is the jurisprudence of our teachers, of our tribunals, of our legislators. Could we have two different systems, one for domestic creditors, and the other for our foreign creditors?

If now we take up this matter again and consider it from the point of view of mankind, we are dealing with a different question. One may then desire for these differences the exclusion of the use of force. Nevertheless, those who are in favor of the privilege of sovereignty in its full extent except from it the cases of "disorder and bad faith as well as those of voluntary insolvency." But, even with this restriction, sovereignty is limited, it may have judges, it may also be legitimately subject to the repression of force.

We will ever meet with this limitation; for even supposing that the general *régime* of arbitration were to be adopted for all disputes between States, could

military sanction be avoided against those that deny the authority of the courts, that refuse to submit to their decisions or deliberately violate them? Is this not, with regard to the society of nations, the same law of necessity as for the society of each nation? From the moment when we submit to magistrates, we must have police whose duty it is to see to it that their decisions are observed.

But how, it will be asked? You grant freedom to the bankrupt, you abolish imprisonment for debt, and still you retain the intervention of force for the recovery of the debts of the States. Do the two things contradict each other? Does the impossibility of imprisonment for debt mean the non-seizability of the goods of the debtor? And what does bankruptcy procedure mean if not a legal seizure of the goods of the insolvent party and their distribution among his creditors?

This is why, gentlemen, we have not subscribed, and do not subscribe to this doctrine. In the legal field it seems to us seriously questionable, in the humanitarian field it could not wholly exclude the sanction of force. In the political field, by making a high appeal to the Monroe Doctrine, it would compromise that doctrine; because, on the one hand, it would draw upon it the antipathy of the world, and, on the other, it would place upon it crushing responsibilities.

Our point of view is quite different.

We too, were most seriously preoccupied with our international honorableness, and we feared greatly that we might compromise it. It seemed to us that the moral aspect and the financial aspect of the question, both being extremely delicate, were dominating all, and did not leave to us a choice of concurring in this opinion, although objections of another nature might not be raised against it. Our credit, always intact, is a structure carefully erected, and we do not wish to expose it to attacks of malevolence which is as watchful in the dealings between nations as in those between individuals. We were, we are
[282] debtors, and we may still need to have recourse to foreign markets. We do not wish then to incur the suspicion of those whom we have so often found ready to cooperate in the development of our prosperity; for God has permitted us to remain unacquainted with usury, and never to meet with that ferocity of capital against which pretense of defense is made. Our creditors have been intelligent and reasonable coworkers in our progress. We could not deflect them in the zeal of their legitimate interests; and, engaged as we felt we were for our own, we did not believe that we had the necessary freedom of mind to assume to consecrate a doctrine in the success of which one might have supposed that advantages would accrue to us.

And it was not merely our own credit that we thought of consulting, but even, to the same extent, that of Latin America in general. We did not desire to part company with the other American States. On the contrary, the same fraternal preoccupation of the authors of the doctrine that we do not accept led us, although we differed with them, to behold in the principle that denies to foreign creditors all means of execution against debtor States, a common danger for all Latin America which is ever looking for capital to develop it, and, in consequence, mainly interested in widening its credit abroad.

Our impression of this matter is very strong. We conceive that when a man owes anything and is so unfortunate as not to be able to pay, we cannot disregard the natural consequences of his embarrassing position. We believe that the

danger and the fear of such consequences may at times act as an efficient brake against the imprudence of contracting debts. We fear that the privilege, imperiously invoked of not having to dread execution by his creditors may be a fatal advantage for him who is in need of securing capital abroad. We believe that the credit of those countries in behalf of whose security the necessity of this principle is affirmed, will resist with but extreme difficulty the shock of its establishment into universal law in international relations. We are, therefore, led to conclude that the introduction of this new rule in the law of nations will be embarrassing and harmful for those one may believe should benefit by it. Finally, in view of these considerations which, to our mind, are evident, we feel persuaded that we would not accept it as a benefit unless it were offered us through the initiative of our creditors themselves as a spontaneous homage of their confidence; and, even in such case, which is altogether improbable, we do not know if it would not be better, for our moral and material stability to do without this concession.

But from the moment it was established through our initiative or through our efforts, the inevitable result would be a general lowering of the credits of the peoples protected by this unwelcome innovation; and if, after its acceptance as an international principle, one were compelled to resort to foreign credit, it would be but at the expense of this very principle, by means of conditions and guaranties that would practically annul it. Contracts of loans to States favored by this new immunity would thenceforth take place only on the basis of pledges of a material nature, mortgages of customs revenues, oppressing and humiliating collateral securities, such as the lenders preliminarily provide themselves with when the law denies them the means of execution. It is in these cases of a paternal *régime* as regards the borrowers that usury with its attendant frauds, its extortions and wretched consequences develops.

It is a fact that only speculators will chance their money to the risks of a loan in which positive law does not recognize the character of executable coercion. Honest capitalists would never lend except with their reimbursement guaranteed.

[283] If they cannot seize the goods of the debtor, they must in advance secure themselves in the patrimony of the latter, to prevent the revenue of the borrower from being spent in some other way, by assuring to themselves, as regards that revenue, a preference in tangible form, sufficient to guarantee its payment.

In our own history we know of a certain domestic case, the lesson of which might be of benefit to those placing such great confidence in that claim.

At a certain time, it was desired to protect the agricultural class in our country, and to that end a privilege was thought of in favor of agricultural property against execution for debt. It was termed the privilege of agricultural property. Do you know what the effect of this proved to be? The credit of the rural proprietors fell and disappeared, or money was lent them only on the most usurious conditions. And at last, gentlemen, it was the agriculturist himself who besought the Government to release him from this specious privilege. His request was granted. Rural properties were reintegrated in the common law, and from that time onward, freed from its false protection, susceptible of being freely executed, if necessary, they have become for their owners the source of a normal and unobstructed credit.

Gentlemen, if you will apply that lesson, you will realize why it was that the doctrine of which I speak has not met with a single partisan among us, but has met with a general opposition, unanimous in the public press, in spite of a certain juridical appearance which has been contested moreover through respectable authorities supported by excellent reasons. All organs of Brazilian opinion have been hostile to it; it has displeased everybody. But in consequence of the change which it has undergone in the American proposition, and, because of another not less important fact, that is to say, the change having met with the approval of the great creditor States, made evident in view of the favorable declaration of Great Britain during our last meeting, the solution has changed in its nature and in its results. The American proposition only reduces international disputes with regard to debts of foreign States to the common right of obligatory arbitration. It does not reject the admissability of the means of compulsion for the maintenance of the creditor's right, after arbitration has failed. In view of this important change, we cannot refuse our vote to it, but always with the presumption that the lending States approve of this pact. Otherwise, discussion of it would not be advisable for the good reason that it would be useless. It might be thought that there is a sort of legalization of war in this act proposed to the Peace Conference. But there is not the least legalization in it. It is the legal admission of a necessity which cannot be destroyed. We confine ourselves to leaving the fact within its inevitable domain, that domain where the sphere of right and of its remedies ends.

The American formula, if it were less sincere, might be silent on the final use of force in cases of disregarded arbitration. But the difference then would be solely that there would have to be read into the text what is now expressed in it. For it is quite obvious, that even though only the stipulation, pure and simple, of obligatory arbitration is expressed, as soon as this is evaded, or its verdict is not respected, the hypothesis of the intervention of arms returns as the only possible corrective of the rejection of an arbitral agreement or of disobedience to its award. This is what the ordinary arbitral agreement passes over in silence, and what the American proposition affirms. The two things differ only in appearance: one is more clever; and the other is more frank.

It is sad that we are obliged always to leave war behind what we do for peace. But so long as war exists and men make of it a means of
[284] reinstating law, we know not how to prevent the melancholy spectacle—of which we ourselves are necessarily parts—of considering it as the last court of appeal for those who, while believing themselves possessors of a law, or having an arbitral decision in their favor, see it flouted by those in rebellion against measures of conciliation and forms of justice. And thus it happens that an assembly met to organize arbitration and peace finds itself compelled to recognize in war a sort of extreme urgency for cases of obstinacy against the decisions of arbitration, or of refusal to accept it.

Nothing could show us in a more impressive manner how our mission is circumscribed by the essence of facts and what a universe of impossibilities is opposed, outside of certain limits, to our most ardent wishes and our most heroic efforts. But within these limits it depends only upon us, that is to say, it depends only upon the nations represented in this Conference, to bring within the sphere of our competence all that comes properly within it, by considerably extending the peace *régime,* and by restricting to an enormous extent the sphere of war. To that end we have but to adopt the principle of obligatory arbitration, by extending

as far as possible the cases of its obligation, even with the reservation, almost everywhere regarded hitherto as necessary for each people, of its independence, its honor, its essential or vital interests.

It is well understood that when speaking of obligatory arbitration, it is not our purpose to include in the obligation of arbitration, the obligation of the tribunal. No, it is not that, the one does not imply the other. On the contrary, they exclude each other. The surrender of the right of choosing the judges is antagonistic to the very essence of arbitration. And furthermore, the submission to an inevitable court would imply, with sovereign nations, a flagrant abdication of sovereignty. In consequence, it would be a pact to no purpose. Therefore, let there be no obligatory court, but only the obligation of arbitration. My Government would accept no other formula.

But once it is adopted by all, the reservation of cases in which arbitration might not form the subject of a coercive stipulation, there is a serious question, the most important of all for the peace of the world and for the civilization of mankind, which this reservation does not attain and which, if we should be able to solve it, would constitute the blessing of this Conference. For, and especially after the timidity with which we cast our last votes, and after we dared not do anything for the right of property on the seas, the opinion of the civilized world would accuse us of having failed to perform our mission, if we were not to agree upon some important measure against the calamity of war.

The measure of the reduction of armaments would be the one least susceptible of realization in view of the infinite diversity of situations for which provision would have to be made by means of a general formula. But there is another one which is by far more accessible. When I propose to increase my territorial holdings at the expense of those of another, it is not my independence that I am defending, it is not my honor that I am safeguarding, and it is not my essential interests that I am insuring; it is my ambition that I lift above the vital interests, above the honor and the independence of someone else. And we see that in such case it is the most direct, the most formal and the grossest violation of the exception that you impose upon the principle of arbitration. Therefore, this particular case comes necessarily under the rule of arbitration, not only because it cannot come within the limitation fixed for it, but also because this limitation itself prescribes it.

On the other hand, this case represents the most manifest violation of the legal principles of all civilization. The States forming a part of that civilization possess, nearly all of them, a territory delimited in the course of the centuries, recognized by the neighbors, recognized by the world. Those engaging in attempts against the stability of this division consolidated by time [285] revolt against the common happiness of our kind. Their ambition is a threat ever hovering over the tranquillity of the world, a continual source of worriment, of impoverishment and of misfortune. If, then, there is a bond that should in this day bind all the Governments whose existence rests upon right, it is the bond of a common resolution against the evil of conquest, ever on the horizon of the life of the peoples as a sign of misery and of desolation.

I do not believe that in our day there will be a juridical Government. —Mark well that I am not speaking of individuals: there are some who are devotees of system, of fanaticism and of hatred—I refer only to the Governments organized according to the laws of our time. I do not believe that

any of them would dare publish its territorial cupidity as a title against the possessions of its neighbors. It is ever under more or less juridical pretexts and principles that enterprises of that kind attempt to disguise their ill-meant character. Questions of this kind come, therefore, naturally within the sphere of international justice. In consequence, we would be but logical by extending the idea of the American proposition to this class of cases.

There is a region in the world that has experienced by far deeper sufferings, that has frequently been up against violence and disorder under other forms, but which is still untainted by this one, the most odious of all. It is in that part of the American continent where is found the country of which I have the honor to be the first representative. That country has declared in the text of its constitution that never, directly or indirectly, would it engage of itself or as the ally of any other country whatever, in a war of conquest.

I am sure that these are also this day the sentiments of all America. I imagine that at present they are also shared in Europe. I suspect that elsewhere they will meet adepts conspicuous for their intelligence, for their grandeur and for the mass of their number. Do not, therefore, understand me amiss, if in addressing myself to the latter in the name of the former, within this hall dedicated to prudence, but also to humanity, I feel urged to bring up this beneficent idea, by expressing the wish that within this very Conference, the rule of the American proposition be extended in future to these more serious cases.

What it wishes to make difficult when the attempt is made under allegations of State debts, it is necessary, *a fortiori*, to make even more difficult in cases where the same attempt would be hidden in the guise of other subterfuges.

It would not yet be the radical formula of the Brazilian constitution. One would but engage in a transaction, by placing between the deliberation of violence and the rights of law, if you will permit me the expression, the moderating intervention of a judgment.

To that end, under a thought far from being Utopian, which appeals only to inclinations of justice and of good-will between the peoples, the adaptation of the American formula that I would dare to submit to you, if it were not to displease you, would, for instance, be as follows, with the exception of such modifications that you might deem it proper to make in it for the success of the idea:

> None of the signatory Powers shall undertake to alter, by means of war, the present boundaries of its territory at the expense of any of the other Powers until arbitration has been proposed by the Power claiming the right to make the alteration and refused, or if the other Power disobeys the arbitral award. If any of these Powers violate this engagement, the change of territory brought about by arms will not be legally valid.

His Excellency Baron **Marschall von Bieberstein** delivers the following address:

Mr. PRESIDENT: As regards the matter of collecting contract debts, a matter which has been the subject of the interesting discourse that we have just
[286] listened to, I have a simple declaration to make: we accept unreservedly the proposition presented upon this matter by the delegation of the United States of America.[1]

[1] Annex 50.

The Commission has furthermore before it a series of propositions tending to make obligatory the recourse to arbitration for certain classes of more or less broad questions.

The moment seems to me to have come when I may state in detail the opinion of the German delegation with regard to the problem of obligatory arbitration.

At the First Peace Conference the German delegate declared in the name of his Government that experience in the field of arbitration was not of a kind to permit an agreement at that time in favor of obligatory arbitration.

Eight years have passed since that declaration, and experience in the field of arbitration has accumulated to a considerable extent. The question has been, on the other hand, the subject of profound and continuous study on the part of the German Government. In view of the fruits of this examination, and under the influence of the fortunate results flowing from arbitration, my Government is favorable to-day, in principle, to the idea of obligatory arbitration.

It has confirmed the sincerity of this opinion by signing two treaties of permanent arbitration, one with the British Government, the other with that of the United States of America, both of which include all judicial questions or those relative to the interpretation of treaties. We have, besides, inserted in our commercial treaties concluded within recent years a *compromis* clause for a series of questions, and we have the firm intention of continuing to pursue the task in which we are engaged in concluding these treaties.

In the course of our debates, the fortunate fact has been mentioned that a long series of other treaties of obligatory arbitration have been concluded between various States. This is genuine progress, and the credit of it is due, incontestably, to the First Peace Conference. It would be an error, however, to believe that a general *compromis* clause agreed upon between two States can serve purely and simply as a model or, so to speak, a formula for a world treaty. The matter is very different in the two cases. Between two States which conclude a general treaty of obligatory arbitration, the field of possible differences is more or less under the eyes of the treaty makers. It is circumscribed by a series of concrete and familiar factors, such as the geographical situation of the two countries, their financial and economic relations, and the historic traditions which have grown up between them. In a treaty including all the countries of the world, these concrete factors are wanting, and hence, even in the restricted list of juristic questions, the possibility of differences of every kind is illimitable. It follows from this that a general *compromis* clause which, between two States, defines with sufficient clearness the rights and duties which flow from it, might be in a world treaty too vague and elastic and hence inapplicable.

Now, if we raise before the world the flag of obligatory arbitration, we must surely have a *compromis* clause which would do honor to this flag and define clearly and precisely the character of the obligation. Without that we should expose ourselves to the reproach of making promises which cannot be kept and of offering a formula instead of a fact. Further, there would be danger that instead of smoothing away a difficulty, there would be added to it an additional quarrel as to the interpretation and application of the treaty itself. It would be a result that could hardly be deemed desirable in an institution that has for its object the pacific settlement of international disputes. To avoid these dangers, it is indispensable that we should preliminarily and thoroughly consider

as to whether the classes that it is desired to submit to universal obligatory arbitration, are really susceptible of being settled in this manner.

[287] It is agreed that the disputes due exclusively to conflicts of political interests and not resting on a legal basis do not come, properly speaking, within the field of arbitration whose object it is to settle international disputes "by way of right." These political disputes come rather within the field of mediation. Recourse to arbitration can regularly be stipulated only with regard to a dispute that has already arisen, in which case the arbitrators are guided not by the right, but by considerations of equity and of public welfare.

We have, therefore, still to consider the disputes of a legal nature. In this respect it is necessary to distinguish between the disputes outside of the conventional law and those that concern the interpretation and the application of international treaties. We have no fundamental objections to offer against the application of the principle of obligatory arbitration, neither in respect of the one nor in respect of the other of these classes. Nevertheless, certain restrictions of a general nature impose themselves. We will have to restrict the range in a twofold direction. Disputes of minor importance do hardly call for arbitration. In the relations of the States, especially all contiguous border States, a number of questions arise almost daily in which a diverse appreciation of matters of fact and of right leads to differences of opinion. Nowadays, all these secondary disputes are settled in a friendly way by the mutual conciliation of the Powers. Now it seems in no way desirable that this condition of things should be replaced by a system that would permit every Power to invoke against any other Power a formal engagement by which to bring the latter before an arbitration court with its long and costly procedure. This would rather accentuate than smooth over a difference.

On the other hand, there are legal disputes that, precisely by reason of their importance, do not come within the field of obligatory arbitration. Even the most fervent partisans of the latter admit that arbitration cannot be forced if the controversial matter involves the honor, the vital interests and the independence of the State. A proposition of the Brazilian delegation adds "the questions that affect the institutions of the States or their internal laws." The characteristic of all these expressions is their elasticity. This elasticity is so great that in a treaty bearing the signature of a large number of countries it would inevitably lead to diverse interpretations and numberless controversies. It is evidently for the purpose of removing this inconvenience that the most of the propositions presented in this respect to the Conference, state that the decision belongs exclusively to the State that invokes these exceptions. For it could hardly be asked of a State that it recognize a third party as judge of its honor and of its vital interests. While admitting that these reservations constitute an indispensable complement of a general *compromis* clause, I cannot hide from myself the fact that they do not quite conform with the idea of obligatory arbitration. Furthermore, even the appearance of a bilateral obligation disappears in the dealings with countries where, in virtue of their constitutions, the decision with regard to the application of the *compromis* clause does not eventually belong to the signatory Government, but to a legislative element. Pleas have been presented in behalf of the propositions referred to by alleging that they make arbitration "more obligatory." I do not desire to consider the interesting question as to whether or not, in legal matters, the word "obligatory" is susceptible of

a comparative degree. Already in Roman law *obligato* and *mera facultas* are regarded as implacable enemies. You will forgive an old jurist for being skeptical with regard to an attempt to reconcile these enemies. But by even leaving aside this legal question, I can in no way admit that the new phraseology that has been proposed to us is more compulsory than the existing one. On the contrary; the solemn declaration of the Powers contained in the Convention of 1899 "that arbitration is the most effective and at the same time the most equitable means of settling disputes," makes available, in my judgment, a
[288] moral force by far greater in favor of arbitration than a universal provision which, obligatory in form but not in its essence, will not enjoy either the universal authority or respect to hasten the realization of the great idea of the pacific settlement of international disputes.

The considerations that we have had the honor of presenting to you bring us to the conviction that as regards the general principle we should retain Article 16 of the Convention of 1899.

As to whether or not there is a restricted field of disputes in which obligatory arbitration might be adopted without any reservation, this is a matter that will still have to be considered.

Within the vast field of international relations that form the subject of treaties between the States, there are undoubtedly some that do not in any way concern either the honor or the essential interests, and to which, in consequence, obligatory arbitration might be unreservedly applied. The problem, then, is merely to see if arbitration may be established within this field by a general and universal agreement. In the first place we will have to think of bringing about such an agreement within the field of universal conventions to which all or a large number of the Powers are signatories. These are, for instance, the postal and telegraphic conventions, those dealing with the protection of submarine cables, still others that deal with the means of preventing ship collisions on the high seas, the protection of literary and artistic works and industrial patents, and also the Hague Conventions with regard to international private law. One of these universal conventions, that of the Postal Union, already contains the *compromis* clause.

When we shall examine the introduction of arbitration in relation to these conventions we will have to take into account the fact that the conformity of their application might be compromised by contradictory arbitral decisions. It will, therefore, be necessary to think of measures that will remove such an eventuality.

Furthermore, it will also be necessary to take into account the difference existing between the conventions exclusively governing the rights and the obligations of the Governments and those that determine the juridical relations of their nationals and the application of which comes within the competence of the ordinary courts. Among these latter I refer to the conventions dealing with industrial patents and international private law.

In relation to universal conventions, and, likewise, in regard to the treaties concluded between two Powers and dealing with technical matters, the question must be examined if it is possible to entrust to one and the same arbitral tribunal the solution of disputes that might arise by reason of their application, and if it is proper always to follow the same procedure. In our judgment, and in a general way, they cannot be submitted to the permanent Hague Court, in view

of the fact that among its members there are none of sufficient competence for the indispensable solution of the various technical matters.

It will indeed be very difficult to solve the problems connected with these matters without resorting to specialists and without close examination on the part of the Governments that have signed the treaties of which I now speak. As concerns the treaties concluded between two States we shall perhaps become convinced that we must leave it with the interested Governments to solve these two questions: in the first place, as to whether disputes arising from the application of the treaty must be submitted to arbitration, and in the next place the manner in which such an arbitration court will be composed.

I have taken the liberty of pointing out to you the matters that seem to demand the attention of the Commission, and especially that of the committee of examination. I desire, nevertheless, to state that we are ready to examine conscientiously and impartially the propositions which have already been made and those which may yet be presented on this subject.

The objection will, no doubt, be made that what is expected of the Conference is not legal debates but real progress. I am thoroughly in agree-
[289] ment with that idea, but, as to universal obligatory arbitration, it is not sufficient for its successful application to assert the principle; it is necessary to arrange practical details. To use a metaphor: it is not sufficient to build a cosmopolitan dwelling with a fine façade: it is necessary to furnish it in such a manner that the nations of the earth may live in it comfortably and on good understanding. The Conference will be responsible for it. And if our conscientious discussions regarding the principle of obligatory arbitration do not lead to a result that will meet fully the hopes roused by the convocation of the Conference, we might at least take a forward step in this difficult question.

I know of still another path opening upon our common goal. The ideal of arbitration between nations will undoubtedly be advanced if we can succeed in improving and simplifying the procedure established by the Convention of 1899 for resort to the tribunal of The Hague. But the most important reform would be that which is indicated by the propositions of the United States of America and Russia, and which would consist in giving to the tribunal of The Hague the character of a really permanent tribunal. We indorse completely the praise which has been accorded to the work of the Hague tribunal; but we cannot shut our eyes to its defects. I do not desire to criticize it, but quite the contrary. It is the great merit of the First Conference to have pointed out the road for us to follow. A veritable permanent court, composed of judges who by their character and competence will enjoy universal confidence, will exert an attraction, automatic, so to speak, on legal differences of every kind. And such an institution will secure for arbitration a more frequent and more extended use than a general *compromis* clause which must be hedged in by exceptions, reserves and restrictions. We are ready to exert all our efforts in working for the accomplishment of this task.

By continuing thus the work of 1899, the Second Peace Conference will not be inferior to the First; and it will justify the hope that its labors may contribute to the preservation of peace, by extending the empire of law and by fortifying the sentiment of international justice.

His Excellency Mr. **J. N. Léger,** in the name of the Haitian delegation makes the following declaration:

The Haitian delegation does not believe it inopportune to explain the reasons that have led it to concur in the proposition of the United States of America regarding the collecting of public debts originating from contracts.

The Haitian Republic has always made it a point to keep its engagements. Its delegation feels, therefore, at ease in paying just tribute to the highly philanthropic idea of the United States.

The conscience of the peoples tends more and more to condemn those summary processes too often used against nations that circumstances render unable to defend themselves. And the United States may justly be proud in seeking to have recorded in a diplomatic document the tacit agreement resulting from the reprobation caused through the arbitrary use of force against the weak.

No one thinks of weakening in the least the old principle of eternal justice: that no one shall grow rich at the expense of his neighbor; every debtor shall, therefore, be held to the obligation of redeeming himself. But it shall be permitted him to plead his cause.

The right of the creditor is in no way restricted, when, for instance, he is compelled to secure from the ordinary courts a decision permitting him to resort to the means of execution. The proposition of the United States of America tends to realize in the international domain the practice observed in all countries where no one is authorized to resort to self-redress. For the direct interest [290] that one may have in a dispute, oftentimes leads one to form illusions as to the extent and the legitimacy of the means one is tempted to resort to in order to secure one's ends. Nations like individuals are not free from suggestions of personal interest or of ill-understood self-respect. Very frequently they have been led to resort to measures disproportionate to the object of the dispute! And the settlements secured in such cases have roused resentment, sown the profound germs of misunderstandings, doubly prejudicial to the respective interests of the nationals and to the cause of civilization in general.

Moreover, the principle adopted by the delegation of the United States of America meets the humanitarian conception of the august sovereign upon whose initiative we have been invited to the Second Peace Conference. And while waiting until time and the progress of public opinion may permit of completely suppressing the use of force, the American proposition will remain the first step taken toward that high ideal. It would be wrong to consider it as of interest to only a part of the world; in our humble judgment, it is even at present one of the safeguards of all the States that adversity might have stricken.

The Haitian delegation accepts it, therefore, while wondering at the same time if it would not be advantageous to omit the last part of the following phrase: "And the guaranty to be given, if there is occasion, while payment is delayed." Instead of thus attributing in advance such extended powers to the international judges, we believe that it would be better to leave to the parties in dispute the matter of specifying the guaranty to be granted. Otherwise, we would risk conferring upon the arbitrators the exercise of a right which, in certain countries, is reserved to the legislative body exclusively. An arbitral decision that should grant guaranties such as the constitution of the condemned party or the national sentiment might not approve of giving, would rather lead to the very conflicts which it is the generous object of the United States to prevent.

For these reasons we propose the suppression of the last part of the sentence of the American proposition. Under the benefit of this amendment we fully

concur in this proposition which, no matter what may be said of it to the contrary, does not constitute a danger for unfortunate States, but States of good faith, and, therefore, really scrupulous in their desire to fulfill their obligations.

In view of the lateness of the hour, the **President** proposes to postpone the continuation and close of the general discussion to Saturday, July 27, at 3 o'clock. (*Approval.*)

His Excellency Mr. **Beldiman** requests the President to include in the program of the next meeting a proposition which he has the honor of now submitting.[1]

He does not desire to detain the assembly by a regular statement of the reasons that have prompted this proposition; he confines himself to a present declaration that his proposition aims at making the project of the United States of America a special agreement which would not come within the scope of the Convention of 1899.[2]

The **President** has special record made of the statement of his Excellency Mr. BELDIMAN and of his proposition which will be printed and distributed.

The meeting closes at 5:30 o'clock.

[1] See p. 244 [244].
[2] Annex 55.

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EIGHTH MEETING

JULY 27, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the seventh meeting are adopted.

Mr. **Pedro J. Matheu**: In the name of the Salvadorean delegation, the first delegate desires to make the following declaration with regard to documents that have been recently handed to us.

The Guatemalan delegation has presented to the Conference the texts of the three last arbitration treaties signed by the States of Central America. These treaties have been printed and distributed.[1]

The last of these treaties is the one concluded at Amapala between Salvador and Nicaragua on April 23 last.

The Salvadorean delegation has just received from its Government dispatches announcing that the said treaty of Amapala has gone out of force since June 11 of this year.

The program of the day then calls for the continuation of the general discussion upon the modifications proposed to Articles 15 to 19 of the Convention of 1899 regarding the pacific settlement of international disputes.

The **President** grants the floor to the speakers in the order of their inscription.

His Excellency Mr. **Keiroku Tsudzuki** makes the following declaration:

The Japanese delegation is very happy to be able to agree to the proposition of the United States of America relative to the limitation of the use of armed force for the recovery of contract debts;[2] it renders homage to the humanitarian spirit which prompts this proposition and interprets it as a restrictive condition and as an obligatory formality to be complied with before the optional recourse to armed force which it is its sole object to limit. Nevertheless, as regards the reasons upon which this proposition seems to be based, the Japanese delegation reserves the right to declare itself later when it shall have before it a definitive proposition upon obligatory arbitration in general.

[292] His Excellency Mr. **Carlos G. Candamo** explains the Peruvian amendment in the following way:

The amendment presented by the Peruvian delegation[3] to the proposition of the delegation of the United States regarding arbitration for disputes of a pecuniary origin, is meant to explain the latter in detail and to restrict its field of application according to considerations imposed by the natural law recognized by all the peoples.

[1] Annex 67.
[2] Annex 50.
[3] Annex 53.

If it is desirable to make obligatory recourse to arbitration when we are dealing with disputes relative to pecuniary interests such as are defined in the proposition of the United States, it becomes useless and illogical to have recourse to it when the parties themselves have agreed in advance upon another manner of settlement for the difficulties that might arise.

For when a Government that deals with alien subjects has specified in a clause of the contract that the difficulties that might arise would be settled by the judges and the courts of the country, it is necessary to take the matter before them. This clause, relative to jurisdiction, has been accepted by the other contracting party and the same conventions are a law to the parties. In the hypothesis foreseen there is, therefore, no longer room for arbitration.

But, if the Peruvian delegation believes that it is necessary to thus specify a limit to the field of application of the proposition of the United States, it desires at the same time to affirm that it does not intend to oppose the general principle of obligatory arbitration for the disputes of a pecuniary origin.

His Excellency **Samad Khan Momtas-es-Saltaneh** speaks as follows:

If I permit myself to rise in order to pay homage to the principle of arbitration which serves as basis for our labors, it is in no way my intention to dwell upon the benefits of this principle for all of mankind. It would, furthermore, be quite useless after the many discourses that have been delivered already to that end.

A long time ago, even before the principle was consecrated by the convention relative to the pacific settlement of international disputes, the very nature of international relations had brought it about that several States, among which the Netherlands holds a place of honor, had agreed to submit those disputes to which the application of their conventions might give rise to the decision of impartial judges.

You know very well what a tremendous growth arbitration has reached since then, for its principle is universally liked. I am not exaggerating in any way in saying that the whole world, each country, of course, in its own way, seeks and attempts to attain as soon as possible that ideal, and that there exists no divergence of view among the States represented at this Conference with regard to the necessity and the benefits of that principle.

Convinced that this ideal is universally appreciated, I am happy to state, nay I am persuaded, that at all events a longer step forward within this fruitful field will be effected before the close of our labors.

The new convention on international arbitration will perhaps prove the most beautiful accomplishment that, upon leaving this hospitable country, we may offer to the nations that sent us thither.

The Imperial Government which I have the honor here to represent, has sought and found, more than once, equity and justice in arbitration, and we believe that it is only by developing this principle that we may come to establish security for the whole world and that it is from such security alone that there may come forth those other questions that we so earnestly think of settling.

In its note of March 16-19 of the past year the Russian Imperial Government states that the First Conference separated with high hope for the future.
[293] Permit me to recall here the very remarkable words spoken by the august initiator of the First and also of the Second Conference:

> The maintenance of general peace and a possible reduction of the excessive armaments which weigh heavily upon all the nations, appear in the present situation of the entire world as an ideal toward which the efforts of all the Governments should tend.

What was true about ten years ago is even truer to-day. And it is to attain to this ideal that we must, in the first place, labor with all our strength within the field of arbitration. Even though we do not this time reach that sacred goal, we must at least work diligently in that direction and wish for it with all our soul: "Seek and thou shalt find."

Gentlemen, we shall also follow with eagerness the champions of the cause of obligatory arbitration and we will do so without hiding from ourselves the obstacles that now stand in the way, but also without losing hope for the future and without becoming discouraged.

Permit me to add that while disposed to vote the most extensive and broadest propositions in the matter of arbitration, the Persian delegation will on its part endeavor to increase the chance of success of those of them which while tending progressively to the zenith of this principle, would at the same time be of such a nature as would make them acceptable by the largest possible number of Powers represented at the Conference.

For we must some day succeed in expurgating from our vocabularies the historic expression, "*si vis pacem, para bellum.*"

Gentlemen, permit me to add this also: some days ago one might have spoken to us of a certain apprehension manifesting itself without these walls; but now everything is happily changed and all of us are glad to realize that confidence is triumphing. The field has been cleared and the forward march has become easier.

As for myself, I have never ceased to be optimistic. It seems to me that in order to succeed, we must be full of hope, even each time when we lose hope.

We have a great task to perform, and, in consequence, we shall, of course, not remain idle in our respective countries with the illusion that that task has already been accomplished.

Public opinion is ever watching us.

Mr. **Pierre Hudicourt** develops the following considerations:

While stating that, under the reservation that you are all acquainted with, the Haitian delegation concurs in the proposition of the United States of America,[1] regarding the collecting of public debts having their origin in contracts, it must not be understood to admit that in such a matter the use of force may be regarded as legitimate. For the Haitian Republic, which in the course of its national existence had to experience acts of violence, has never regarded them with the resignation with which we accept accomplished facts: it has never submitted to them except by protest and in appealing to history and to mankind that it has complied with the exigencies that were imposed upon it. But, in taking into account the present condition of things, it has desired to contribute to a forward step in international law.

At the point we have now reached in our discussions, do not expect a speech from me; but in the presence of the apparent contradiction of arguments I believe that some detailed explanation is absolutely necessary.

[1] Annex 50.

In order to appreciate fully the philanthropic proposition of the United States of America, we must go back to the year 1902 when there was formulated by the Argentine Republic that doctrine known ever since as the DRAGO doctrine. What was at that time, and what is at the present time the international practice in the matter of collecting public debts on the part of the Powers?

[294] By virtue of the right of sovereignty to the effect that each Power in the settlement of its international relations considers only its own interests, the powerful claiming State organizes an expedition. The fleet, after having reached its destination and sent an ultimatum of short notice (sometimes only three hours), seizes or sinks the vessels found in the port, bombards public buildings, kills some innocent or inoffensive persons, establishes a blockade and does not cease its hostile acts until it has obtained satisfaction. On other occasions, when the money has been sent on board the ship, a letter of excuses is demanded with volley of cannon to salute the flag which has just provoked so many just rancors. This, in short, is the picture of humiliation to which leads the current practice of the arbitrary use of force for the collecting of public debts.

Well now! It is to avoid henceforth all these acts of summary execution that the proposition of the United States of America has been formulated; it is in order to prevent the self-respect of the great chancelleries which the alien national knows ever how to exploit, from becoming involved without previous and contradictory examination of the facts in these operations which but too frequently have disturbed the conscience of mankind.

What is to be gained by the American proposition? It tends to the submission to impartial judges at the Hague Arbitration Court, so his Excellency General PORTER has informed us, of the facts of the case, in the conditions foreseen in Chapter III of the Convention for the pacific settlement of international disputes. Before this court, the parties shall have the right to present their respective claims, inclusive of reconventional demands; and if the condemnation is to follow, the court shall determine the mode and the period of payment. Are not these the same conditions under which conflicts concerning private rights are ordinarily settled? Is it not a fact that all the guarantees which private individuals find available before the ordinary courts are also met with before this arbitration court, but greatly enlarged and properly proportionate to the great interests involved?

It is undeniable that the improvement in the conditions of life has followed a progressive march since the nineteenth century. Man constantly aims at an ideal of peace and of perfection unknown in the olden times. The codes of laws and juridical practices are touched by a great human sweep that lays low all international barriers. The bond of solidarity between men has, as a result thereof, become strengthened and the time is perhaps not far distant when the new conditions of the life of the peoples will give the lie to the old saying: *Homo homini lupus.*

Are we to fear that the same men who in their respective countries so efficaciously contribute to the perfecting of public institutions and to the humanizing of social relations, will forget their principles and their ideas after they shall occupy their seats of international magistrates? On the contrary, it seems that these principles and these ideas will be broadened, for the field of their application will henceforth be vaster. Just and equitable when they are called upon to conciliate the interests of a creditor who " may not be forced to receive

in part the payment of even a divisible debt" with those of an "unfortunate debtor of good faith" in the grip of misfortune, will they then cease to be just and equitable when, instead of two private individuals, two States are concerned? For my part I cannot believe that.

It is certain that the circumstances of *force majeure* that should put a State into a condition only momentarily, of being unable to pay a debt, would come within the jurisdiction of the arbitration court. For the circumstances of *force majeure,* that is to say, of the facts independent of the will of man, may, in paralyzing the will to do, frequently prevent execution of obligations.

On the other hand—and let this accrue to the glory of humanity,—I cannot imagine a great creditor nation which, in virtue of the arbitral decision, [295] would forget to consider as "of bad faith" the debtor State unable to meet its obligations as the result, say, of an inundation, of a volcanic eruption, of failure of crops, etc. The testimony of contemporaneous history is against any such admission; international public charity has but too evidently affirmed itself under the most diverse forms on the occasion of the catastrophes of the *General Slocum,* of Martinique, of Courrières, of San Francisco, of Santiago de Chile and of Jamaica.

But what seems to worry some of our colleagues is that in the American proposition reference is made to the eventual employment of coercive measures; it has been said that this would recognize the right of a Power to resort to force. I do not believe that this fear is well founded. The absolute right of each sovereign Power is to regulate its international dealings in a manner that it may judge most convenient for its own interests. And this absolute right can be limited only by the absolute right of a rival sovereign Power. Thence arises the necessity of being strong enough to oppose force with force. In these conditions, it is impossible to invoke a legal status with the necessary suppleness of a juridical bond.

In the proposition of the United States of America, there is reference to a *conventional right* to be created for the exclusive protection of the weak States. There is nothing dishonorable or humiliating in our concurring in this proposition which demands of the Powers gathered at this Conference the signature of a convention by which they would for the moment forbid one another to bring the crushing weight of their armaments to bear upon a State that is in misfortune. And the consequence of such an agreement would be that those unable to oppose force with force will at least have the opportunity of opposing force with right.

We belong to those who think that there are concessions against which we must guard, even preferring thereto the worst calamities; but also sacrifices that we must be willing to bear when they have for their object a noble and generous goal.

To secure the opportunity of offering explanations before a disinterested jurisdiction and to attempt to come to an understanding before resorting to war does not mean a concession to what is improperly called the right of force; nor does it mean the imposition of any sacrifice whatever; but it does mean the performance of a praiseworthy act, for it means a warding off of violence, a diminution of the hazardous chances of brute and blind force, and it means real and certain progress toward the common ideal, that is, universal peace.

In adopting the proposition of the United States of America, the weak States do not recognize the legitimacy of the eventual employment of force any more

than they renounce the right to defend their honor, their sovereignty and their independence.

His Excellency Mr. **Carlin** speaks as follows:

In the meeting of July 18, the Swiss delegation had the honor of stating, in accordance with the instructions of its Government, the point of view from which it regarded the proposition concerning the collecting of contract debts, as it has been presented by his Excellency General PORTER in the name of the delegation of the United States of America.[1]

This day I desire to say a few words with regard to the propositions of obligatory arbitration that are before us.

The Swiss Confederation has ever taken a lively interest in the efforts tending to propagate the institution of arbitration. It is necessary to recall that in this field it anticipated all other countries. As early as 1883 it proposed to the United States of America the conclusion of a permanent arbitration treaty. At the same time it took the initiative for the introduction of the arbitration clause in international treaties.

[296] Furthermore, under the presidency of one of its former magistrates, JACQUES STÄMPFLI, there sat in Switzerland one of the most important arbitration tribunals, that of the *Alabama*.

Since the First Peace Conference, and taking its cue from Article 19 of the Convention of July 29, 1899, for the pacific settlement of international disputes, the Confederation has concluded arbitration conventions with Belgium, with Great Britain, with Italy, with Austria-Hungary, with Sweden and Norway, with Spain and with Portugal. The Convention signed with the United States of America, November 24, 1904, has not been ratified by the United States.

Finally, a special arbitration clause has been inserted into a long series of treaties concluded by Switzerland, thus, for instance, in her recent treaties of commerce with Italy, with Germany, with France and with Austria-Hungary, and in her conventions with Italy relative to the exploitation of the Simplon line.

As was so well stated in our last meeting by his Excellency, the first delegate of Germany, the merit of this propagation of the arbitration idea incontestably belongs to the First Peace Conference. And the Confederation would not have asked for anything better than to continue in this path through the conclusion of arbitration treaties with still other States apart from those I have given a list of. For, in accord with what his Excellency Baron MARSCHALL said, it believes "that it will not suffice to build a world edifice with a beautiful façade, but it will also be necessary to furnish that edifice in such a manner that the countries of the world may there live in comfort and in good understanding."

But since propositions whose purpose it is to introduce the obligatory arbitration clause into a world Convention have been submitted to this Conference, the Swiss delegation feels it important to state that it has no objection *of principle* to raise against the spirit by which these propositions were dictated. On the contrary, it is fully inclined to support as best it can any effort tending to give wider application and greater obligatory force to the principle of arbitration. It is particularly pleased with the proposition of the United States of America,

[1] Annex 50.

and may state that it approves it in principle, save some reservations concerning especially the constitution of the Confederation, reservations which it may become necessary for it to state in detail in the course of our subsequent discussions.

His Excellency Mr. **Beldiman** speaks as follows:

I ask permission to state briefly the considerations that prompted the proposition that I have had the honor to submit in the name of the royal Government [1] and which you have already in your hands.

In the first place I desire to state that it is not at all our intention to oppose the proposition of the United States of America regarding the limitation of the employment of force for the recovery of public debts.[2]

If we were engaged in voting for or against the proposition, the Roumanian delegation would abstain from voting, explaining such an abstention by the very simple reason that my Government does not believe that it behooves us to study the special causes and circumstances that have dictated the proposition of the United States, nor to appreciate its scope and practical consequences. I should therefore not have been led to enter into this discussion if the question before us were not an entirely different one. In our quality as signatories of the Convention of 1899 for the pacific settlement of international disputes, we must ask if the proposition of the United States has a proper place in this Convention. or if it does not fall without the scope of the principles that govern it.

Indeed, this international document has established for good offices and mediation, for the commissions of inquiry, for international arbitration, for [297] the permanent court and for arbitral procedure, stipulations of a general nature, unanimously adopted and having their sources not in the special circumstances pertaining to this or that group of States, but in the fundamental principles of public international law. The adhesion of the States that have not participated in the First Peace Conference, an adhesion affected in the beginning of our labors, has imparted to the Convention of 1899 a world character which excludes—as concerns the application of the principles which it adopted —any differences between the Old World and the New World. In the great humanitarian path laid out by the Convention of 1899, there can be no longer any question of special stipulations directed more to one hemisphere than to another.

This is not the case with regard to the American proposition which has now been submitted to our discussions.

We have been present at a series of statements and of declarations on the part of the representatives of the Republics of South America directly involved in the matter, which, while accepting arbitration that has been foreseen for disputes arising from public debts, are categorically opposed to any coercive measure for the collecting of such debts, in one way or another, even in case arbitral procedure were to prove inefficacious. In the course of these discussions we have even heard of a doctrine that seemed to proclaim the insolvency of a State as one of the intangible prerogatives of national sovereignty.

All these results have amply confirmed the impression made by the proposition of the United States at the very beginning, that is to say, that we were not dealing with a principle of a general nature that was to be inserted in the Convention of 1899, but with a special provision, born of particular circumstances

[1] Annex 55.
[2] Annex 50.

and events that have taken place in South America, a provision that on no account could be applied to Europe.

We are wondering if it would be conformable with the spirit of the Convention of 1899 to insert a *sui generis* stipulation marking so strict a distinction between the two hemispheres?

We do not believe so. Indeed, would it not be a strange thing if in this same Convention in which it has been stipulated that matters concerning the national honor and the vital interests of the State cannot be submitted to arbitration, we should introduce a new article providing for arbitration and even for the eventual use of force for those practical cases in which the national honor and vital interests are involved to an extreme degree? We believe, on the contrary, that it is the first duty of a State to administer its finances and its economic relations in such a manner that it may in all circumstances meet its obligations. It has been said that there are cases of *force majeure*, of great economic crises that might, at a given moment, shake the solvency of the State. But in the first place, such eventualities are too rare to make it necessary to foresee their consequences in international stipulations. In the next place, it is in precisely these great exceptional trials that the vitality, the energy and the spirit of sacrifice of a nation manifest themselves to the end of maintaining intact the credit of the State with regard to foreign States, even in the most difficult circumstances. It is only in this way that a people, conscious and scrupulous of its duty and of its obligations, insures, for its own forces, the safeguarding of its national honor and of its vital interests.

We would, therefore, be committing a strange contradiction by including in the Convention of 1899 a new stipulation which, far from meeting the general principles that constitute the basis of this Convention, would affect it injuriously by providing for eventualities that are incompatible with the dignity of the States.

[298] The representative of one of the Republics of South America has here stated that no Government could sign an agreement foreseeing its bad faith. This is quite correct. But we could even less conceive of an international stipulation resting on the hypothesis of the eventual insolvency of the State.

Gentlemen, such are the conditions that militate in favor of the proposition that I have had the honor of submitting to you.

If the Commission is willing to recognize the justness of our observations, the proposition of the United States should form the object of a special agreement to be concluded between the interested Powers with no connection whatever with the Convention of 1899.

His Excellency Sir **Edward Fry** makes the following declaration:

It is impossible to deny the existence of difficulties that will make themselves felt when we take up the discussion of universal arbitration,—using the happy phrase of our illustrious colleague, the ambassador of Germany. Nevertheless, while recognizing these difficulties, I am happy to be able to state that the British delegation fully concurs in the principle of general arbitration that prompted the projects submitted by the delegation of the United States of America [1] and of Portugal.[2]

It is a fact that for a long time Great Britain has shown herself the sincere

[1] Annex 21.
[2] Annex 19.

friend of the principle of arbitration as a means for avoiding recourse to war and all the terrible consequences deriving from it. She has shown it in an unequivocal manner first in consenting to submit to arbitration a number of disputes with other States, of which number several are of the highest importance; in the next place by concluding since 1903 obligatory arbitration treaties for the settlement of questions of law and of the interpretation of diplomatic documents with not less than ten Powers, to wit: France, Italy, Germany, Sweden and Norway, Switzerland, Portugal, Austria-Hungary, the Netherlands and Denmark. She has shown herself also disposed to conclude a similar agreement with the United States of America.

Her experience in arbitration matters has, therefore, been of the most extended kind, and, although the result may not always have been in agreement with her hopes, she thinks nevertheless, that the time has come to take a forward step in the path leading to the conclusion of a general agreement for the settlement, by means of arbitration, of any question susceptible of such a solution.

I anticipate that it may be said that any agreement which we might conclude could have but insignificant results, because the *vinculum juris* that it would create, when envisaged from the juridical point of view would be weak and indefinite. But the nations are not solely governed by juridical conceptions, nor are they only interunited by the *vincula juris*. As for myself, I believe that the treaty which we have in mind will be of great importance in history as being a collective expression of the conscience of the civilized world. (*Applause.*)

His Excellency Count **Tornielli** makes the following remarks:

The Italian delegation would be happy to give its unreserved approval to the proposition which the delegation of the United States of North America has submitted,[1] to introduce arbitration in the differences of a purely pecuniary origin arising from contract debts, and demanded of the Government of one country by the Government of another country as due to its citizens. As is well known, Italy stands ready to give the widest application to the principle of international arbitration. Even if she cannot expect all the Powers represented at the
[299] Conference to follow her as far as she herself has gone in this path of civil progress, she cannot refuse to give her aid at all times when the question arises of giving a more extended application to the principle which she has adopted, nearly without any reservations, in some of her most recent treaties. He who desires most, also desires least. We cannot depart from this popular dictum.

But the Italian delegation has been desirous to consider to what the favorable vote that it was prepared to cast in favor of the proposition of the United States would lead it, and it has thought that it will be necessary for it to reserve such vote until the time when it would be assured, by means of explicit explanations, that it will run no risk of getting itself into an equivocal position, which, from all points of view, would be most regrettable.

Do not, gentlemen, regard it as exceeding the bonds that in this matter I enter into some detailed explanations.

Interpreted in its literal sense, the proposition of the United States means that if the citizens of some country have entered into a contract with a foreign State, and in case the State to which these citizens belong deems it opportune to

[1] Annex 50.

take their interests in hand, in the case of differences that might arise over the execution of such contract, recourse to coercive measures is forbidden until an arbitration offer has been made by the creditor.

But the proposition fails to enlighten us upon two essential matters. It does not state why such an offer shall not be made by the two parties in dispute and why the right or the duty of making such an offer should be reserved for the creditor only. Nor have we been told if, before submitting the dispute to the decision of the arbitrators, all the instances of ordinary judicial jurisdiction must have been exhausted.

Furthermore, why should we refer to coercive means which can be but the *suprema ratio,* when it would be simple and easy to refer only to the mutual obligation of having recourse to arbitration?

We know full well that in the United States, neither the nation, nor the component parts of it can be subjected to such a jurisdiction. But this is not the case in most of the other countries where the State may be cited before the ordinary courts for contractual pecuniary obligations that it may have stipulated. We may possibly have unduly complicated matters in considering that such obligations may arise from loan contracts. But even in cases of loans contracted abroad there may be two kinds of obligations. The State that in the exercise of its sovereignty enters into what is called a financial operation, may contract obligations of a special kind with the banking firms that guarantee its issues, while at the same time it contracts obligations of another kind toward the bearers of these certificates. I do not in any way mean to dwell long upon this matter. The short outline that I have just traced is intended solely to make clear that, if instead of calling our attention to this class of obligations arising from contracts which are not frequent, our attention had been called to those other contracts that are most usually resorted to when a Government, in order to procure from the great metallurgic shops with a clientele representing the entire world, or from great maritime construction companies, that which it is in need of, enters into pecuniary obligations, it is possible that in that case the intelligibility of the proposition that we are examining, would have been considerably facilitated.

Fully aware of the fact that the proposition of the United States of America may find a wide field of application, even though it were contestable that it might contemplate differences arising between holders of certificates and the debtor Governments, the Italian delegation would not find it difficult to give its unreserved approval to that proposition.

[300] But the proposition that we are considering has been accompanied, on the part of my distinguished and excellent friend, his Excellency General PORTER, by a statement of the reasons which all of us have heard in the fifth meeting of this subcommission. In the beginning of his interesting communication the eminent delegate of the great North American confederation told us that he desired to explain in detail the nature of the scope of the proposition. He has done so in most excellent terms and with a clearness for which we are grateful to him. He has told us—I quote his words literally:

> This proposition solely relates to claims based upon contracts entered into between a State and the private individuals of another country and does in no way include claims for losses occasioned to foreign residents, such for instance as unjust imprisonment, violent acts on the part of the masses,

inhuman treatment, confiscation of property, acts of flagrant injustice, etc. . . . for which an indemnity might be demanded.

I do not know why, in view of the fact that it furnished us with a detailed list of those cases in which aliens are exposed to serious prejudices giving rise to indemnities, the American delegation should have omitted to include also in this nomenclature the cases of denial of justice. I only remember from his statement of reasons that all such cases are not included in those for which recourse to coercive measures implying the use of military or naval forces, may not take place until an arbitration offer shall have been made by the plaintiff and refused or left unanswered by the State of which indemnities are demanded.

The Italian delegation wonders, and perhaps some of you also may wonder, if the well-known rule "the case provided for excludes the case not provided for," *inclusio unius, exclusio alterius,* must here find its application. If it were so we would have to consider how we might succeed in settling disputes that have regularly entered into the phase of diplomatic negotiations in regard to cases of denial of justice or claims for prejudices occasioned to alien residents. In view of the fact that the conventional clause which the delegation of the United States proposes for our acceptance will not include these cases, will the latter give rise to the immediate resort to coercive means when there has been no previous offer of recourse to arbitration? This, in truth, cannot be presumed. Would the Washington cabinet in such case accept that interpretation?

Still other considerations impose themselves. Most of the diplomatic differences arising from cases of denial of justice, or from claims for prejudices, amount to but small sums. So soon as it is agreed that the duty of submitting such differences to arbitral justice does not exist, might not the States inclined to refuse to grant just indemnities show their defiance by telling the plaintiff State: We refuse to avail ourselves of your arbitration offer, you come and secure by force the indemnities you demand? His Excellency General Porter has told us that it is very easy to incur expenses running up into the millions if in this way one endeavors to secure the collection of some hundreds of thousands of francs.

Shall we, then, have to give up all hope of securing through the application of arbitral justice to the cases that interest us and that each one of us may readily envisage, a condition of things that would protect the relations of the countries of Europe with distant nations against difficulties that have but too frequently arisen? Italy, whose surplus population spreads over the American States, is too greatly interested in the maintenance and in the development of her relations of amity and of fraternity with those countries to permit her to consent to expose them to the chance of uncertain interpretations of a conventional clause that is not unequivocal. The Italian delegation believes that the delegations of the
[301] said States would be equally interested in joining in a demand for explanations which it addresses to the delegates of the United States. In this way they would show that they appreciate the value of sentiments of cordial friendship of which I am happy to bear testimony on the occasion when, for the first time, their countries are represented in the great international Conference.

It will, therefore, depend on the answers to our remarks as to whether or not the Italian delegation may also, as it wishes to do, accept unreservedly, the proposition of the United States.

His Excellency Marquis **de Soveral** makes the following declaration:

The Portuguese delegation is happy in being able to state that it will with the greatest pleasure vote the proposition of the delegation of the United States of America for the reason that it undoubtedly consecrates the principle of obligatory arbitration with regard to one of the points specified in the proposition which the Portuguese delegation has had the honor of depositing with the Bureau of the Conference.[1]

His Excellency Mr. **Carlin**: I have asked to be permitted to speak in order to support the proposition presented by his Excellency the first delegate of Roumania.[2]

It seems to me that the very turn that our discussions have taken already sufficiently proves how important it is to keep the two matters that are before us distinct: obligatory arbitration on the one hand, and on the other hand the proposition of the delegation of the United States of America concerning the collecting of contract debts.

The distinction referred to is as well demanded by the very logic of things. The Convention of 1899 deals only with the friendly settlement of differences that directly arise between the States, whilst the proposition of the United States of America provides for the arbitration of controversies having their origin in pecuniary claims of private individuals and that become but indirectly controversies between States by reason of the fact that a State intervenes in behalf of the private claims of one or of several of its nationals.

It is for these reasons that the Swiss delegation associates itself with that of Roumania in demanding that the proposition of the United States concerning the collecting of contract debts become the subject of a special agreement, distinct from the principal Convention upon arbitration.

Let it not be said that it devolves upon the Drafting Committee to settle this matter. The latter is of material importance—if for no other reason than that of observing formality—and the Commission, in my judgment, has the right and the duty to express itself upon this matter which may influence the vote of the delegations.

His Excellency Mr. **Mérey von Kapos-Mére** takes the floor and speaks as follows:

The Austro-Hungarian delegation is able to state that it has no objections to make against eventual stipulation by which the Powers should renounce the use of armed force for the collecting of contract debts until after an arbitration offer had been made by the claiming Power and refused or left unanswered by the debtor nation, or else until after arbitration had taken place and the debtor nation failed to conform to the decision rendered. We are therefore prepared to accept the proposition relative thereto and made by the United States of America, without formulating the slightest reservation.

As regards the propositions tending to establish at The Hague a permanent arbitration tribunal in the true sense of the word, we have not even the intention of objecting in principle to a creation of this nature, but we reserve our definitive vote until such a time when the discussion regarding the details of these projects shall have come to an end.

[302] As regards the different propositions that have been submitted with regard to obligatory arbitration, Austria-Hungary, faithful to the stipulation

[1] Annex 19 and 34.
[2] Annex 55. See p. 299 [298].

contained in Article 16 of the Convention of 1899 concerning the pacific settlement of international disputes, is in principle favorable to the idea of obligatory arbitration. The arbitration treaties that we have concluded since then with Great Britain, with the United States of America, with Switzerland and with Portugal are the best proof thereof. It is true, and we all of us are aware that, in so far as the most of the treaties concluded between different Powers contain the clause of the honor, the independence and the vital interests, the engagement that results from these treaties with regard to the contracting Powers is not, properly speaking, a legal obligation, but rather a moral obligation. Nevertheless, I would not underestimate the value of this moral obligation in setting forth this difference. On the contrary, the fact—at least as far as I know—that no case has arisen in which a Power has failed to meet this obligation, seems to me to be in favor of that system. If, in consequence, the labors of this Conference should result in the conclusion of a universal obligatory arbitration treaty, Austria-Hungary would not fail to adhere to it.

We are likewise prepared to examine the propositions and suggestions relative to the application of obligatory arbitration without the said reservations to certain classes of matters.

His Excellency General **Porter**: After several weeks of *pourparlers* and of exchanges of views that have permitted each delegation to express its feelings with regard to the proposition of the United States relative to the collecting of contract debts, we have come to the close of this very interesting, very instructive and very eloquent debate; now I ask that the proposition be brought to a vote.

And in order to answer the questions put by the honorable delegations of Roumania and of Switzerland, I call for a separate vote upon my proposition,[1] which is distinct and independent of the rest.

His Excellency Mr. **Carlin** asks if General Porter merely desires a separate vote upon his proposition, or if he also desires that it be made the subject of a separate convention.

The **President**: It is important, before passing on to the taking of a vote, that we should clearly define the scope of our action.

The general discussion has borne upon two matters that have been confounded and mixed in the general remarks that have been exchanged. We have listened to:

1. Explanations regarding the special proposition relative to contract debts;

2. Declarations and discussions upon obligatory arbitration and upon improvements to be introduced into the Convention of 1899.

We have now come to the point where we may not continue to confuse these two matters, nor where we shall further confuse the question of the vote upon the propositions and that of the place to be attributed to them.

I have frequently considered the case, supposing that the proposition of General Porter were voted, that it would be necessary to find out what place should be assigned to it, and I have come to the conclusion that we cannot express ourselves upon this matter before the close of the Conference. Then only will it be possible to determine the place to be attributed to the propositions which of

[1] Annex 50.

and by themselves are not connected with some article of the Convention; only then will it be possible to decide as to whether or not they come within the body of the Convention or should form the subject of a special act. If we were to apply the inverse method we should come to contradictory results and do away with the rôle of the Drafting Committee to which the Conference has specifically committed the task of properly editing and assuring proper order to our decisions.

[303] It would be, therefore, premature to declare even now that the proposition relative to contract debts shall be included in the general Convention or that it shall be excluded therefrom.

But, on the other hand, there is nothing to prevent us from voting even now upon the essence of the proposition. As regards the reservations of Messrs. BELDIMAN and CARLIN it goes without saying that they will be submitted to the Drafting Committee.

If the Commission accepts this method, we are then in the presence of two votes of principle to be adopted successively, and these two votes are perfectly distinct. The first relates to the special American proposition in regard to the collecting of debts. As to whether or not this special proposition contemplates one of the cases of obligatory arbitration of which we may have to draft a list, or if it envisages a situation independent of this list, this is a matter that shall be examined at the proper time; but at present we are to express ourselves upon the essence of the matter.

When this shall have been done, we shall then pass on to the second vote relative to the consideration of the propositions concerning obligatory arbitration. This, in my judgment, is the method that must be adopted.[1]

His Excellency General **Porter** accepts this method of procedure.

His Excellency Mr. **Beldiman** insists upon knowing if his Excellency General PORTER means that his proposition is to form the subject of a special convention apart from the Convention of 1899.

His Excellency General **Porter** answers in the affirmative.

His Excellency Mr. **Beldiman** has record made of this answer.

His Excellency General **Porter** objects to this by saying that he has concurred in the remarks of the PRESIDENT, and that it is not logical to ask more of him in case his proposition is to be referred to the committee.

The **President,** without referring to his previous remarks, observes that it does not depend upon one member of the Commission to decide as to whether or not certain propositions shall form part of a special convention. This matter does not even depend on the authors of a proposition; it comes within the authority of the full Conference or of the delegates whom the latter may have designated to that effect; the Conference alone is entitled to settle it. (*Applause.*)

His Excellency Mr. **Carlin** insists that the subcommission shall express itself and right now upon the important question as to whether or not it is necessary to establish a special convention.

The **President** requests the Commission to express itself by the raising of hands upon the proposition of his Excellency Mr. CARLIN.

This proposition is not adopted.

[1] See p. 310 [308].

Before proceeding to the vote, the **President** grants the floor to the delegates who desire to explain the vote of their delegation.[1]

His Excellency Mr. **de Villa Urrutia** makes the following declaration:

The Spanish delegation has expressed itself in favor of any proposition the object of which should be to favor, within the limits of right, the legitimate and pacific development of the Spanish-American Republics by protecting them against the possible abuses of force. All that which in this respect would serve to broaden and to strengthen the fruitful principle of international arbitration by making it obligatory for disputes of a pecuniary nature, will have our sympathies and will receive our assistance.

[304] We adhere, therefore, to the principle of substituting arbitration for force; the proposition of the United States of America has been prompted by this principle, and we are inclined to adopt it, with the reservation, however, of a phraseology more conformable to this principle and not susceptible to the equivocation to which his Excellency Count Tornielli has just called the attention of the Commission with such eloquence and justice.

His Excellency Mr. **Domingo Gana** expresses himself as follows:

The Chilean delegation[2] believes that the proposition of the United States of America[3] meets very high sentiments of international justice and concord. The fundamental idea that inspired it is the same as the one that guided the Chilean delegation in presenting its own proposition.

The two propositions rest on the same doctrine; both recognize the optional right of requiring execution of pecuniary obligations, and the two are also in agreement for establishing obligatory arbitration as the most reasonable and the most equitable means for putting an end to this class of misunderstandings.

In its proposition the Chilean delegation has given even a wider range to arbitration by extending it not only to cases arising from contracts, but also to cases in damages caused by a State to the citizens or subjects of another State.

In presenting our proposition we thought that without modification of the gist of the American proposition, we might agree to find another phraseology that should better meet the thought of conciliation and of justice of which it is born. Having made this statement, the Chilean delegation is disposel to cast its vote in favor of the proposition of the United States, but reserving unto itself the right to give its approval to any other proposition that might even more nearly meet its aspirations.

As regards the proposition that we have had the honor of presenting, we accept gladly the idea expressed by our president, to refer it to the committee of examination upon whom it devolves to study all the propositions dealing with arbitration.

Baron **d'Estournelles de Constant** speaks as follows:

The French delegation gives its cordial adhesion to the principle of the proposition submitted by our honorable colleague of the United States, his Excellency General Horace Porter, concerning the collecting of contract debts.[4]

We regard this proposition as very interesting, and we shall examine it with the greater sympathy because it is somehow complementary of the proposi-

[1] See p. 309 [307].
[2] Annex 52.
[3] Annex 50.
[4] *Ibid.*

tions which several delegations, and especially the delegation of the United States, have submitted to our Commission with regard to obligatory arbitration.

His Excellency Mr. **Prozor** declares himself as follows:

Before taking part in the work in which the United States of America has taken the generous initiative, the Russian delegation desires to recall once more that in its judgment we are dealing with a measure of high equity which must, in consequence, realize all the conditions implied in that word, inclusive of the respect for actual situations. It is, therefore, thoroughly understood that the agreement which we seek to reach should have no retroactive effect. Gentlemen, I believe that there can be no doubt as to the justice of this attitude which is urged upon us by the sincere desire to collaborate in a system of good faith and security, based upon the respect due to all legitimate interests.

[305] Mr. **Corragioni d'Orelli** speaks as follows:

I declare that in conformity with the instructions of the royal Government, the delegates of Siam will support any proposition tending to confirm the principle of arbitration.

We shall therefore vote the propositions now submitted to the Commission, and that have for their object the wider extension of the application of this principle.

His Excellency Mr. **Luis M. Drago** explains his vote in the following way:

The delegation of the Argentine Republic votes affirmatively for the proposition of the United States of America concerning contract debts, with these two express reservations that must be recorded:

1. With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall not be had to arbitration except in the specific case of denial of justice by the courts of the country which made the contract, the remedies before which courts must first have been exhausted.

2. Public loans, secured by bond issues and constituting the national debt, shall in no case give rise to military aggression or the material occupation of the soil of American nations. We make this reservation in agreement with the terms of the dispatch which the Argentine Government sent with regard to this matter to its minister at Washington, December 29, 1902.

His Excellency **Samad Khan Momtas-es-Saltaneh** states that he concurs in the reservation made by the Italian delegation.

His Excellency **Turkhan Pasha** expresses himself as follows:

The Ottoman delegation reserves its attitude with regard to the proposition of the United States of America for the time of the discussion of the report of the committee of examination when that report shall be presented to the Commission.

Mr. **Georgios Streit**: The Hellenic delegation in its turn, desiring to explain the vote it is going to cast with regard to the proposition of the United States of America concerning the limitation of the use of force in collecting ordinary public debts having their origin in contracts, has the honor to declare that as regards the obligation to have recourse to arbitration contained in this proposition, it refers to the declarations which it thought it its duty in the next to last meeting to present to this high assembly. As to the addition contained in the proposition of the United States and relating to the use of coercive measures in case arbitration were not had recourse to or were left without effect, the Hellenic delegation wonders, apart from considerations presented on the part

of others, if it is desirable to include this addition in an international agreement which would seem destined to regulate the pacific means available for settling international disputes.

For these reasons the Hellenic delegation is not able to vote in favor of this proposition of the United States of America.

His Excellency Mr. **Sebastian B. de Mier** explains his vote as follows:

The Mexican delegation casts its vote in favor of the proposition of the United States of America with the interpretation which it had the honor of presenting to the Commission, that is to say, that, according to the opinion stated by the honorable delegates of the United States of America to the Pan American Conference of Rio Janeiro and at this meeting by his Excellency Count TORNIELLI, it understands that diplomacy will act only after all other legal recourses have been exhausted in those cases where recourse must be had to the courts in accordance with the principles of international law.

[306] Mr. **José Gil Fortoul** makes the following declaration:

The Venezuelan delegation, while recognizing that the proposition of the United States of America is a considerable effort toward the pacific settlement of international disputes, reserves its vote until the committee of examination shall have submitted its report upon the various propositions and reservations made by several other delegations.

His Excellency General **Vargas** speaks as follows:

The Colombian delegation accepts the proposition of the United States of America with the following reservations:

It accepts in no case the use of force for the collecting of debts, nor does it accept arbitration before recourse has been had to the courts of the debtor State.

His Excellency Mr. **Victor Rendón** explains his vote in the following way:

The delegation of Ecuador is pleased to pay its homage to the spirit of progress that has prompted the proposition of the United States of America, and we shall give it our vote because we believe that it contains, perhaps, the maximum advantages that it is at present possible to secure, but we express our regrets that as a result of it the threat of armed intervention has not disappeared, an intervention which in the Peace Conference, it would seem, ought to be completely discarded.

In adhering to this proposition we make the following reservations:

1. Arbitration can only be demanded in case there is a presumption of denial of justice and after having exhausted all the legal remedies of the country;

2. Armed intervention cannot take place after the arbitral award has been made unless the bad faith of the debtor is clearly proved.

Mr. **José Tible Machado** makes the following declaration:

The Guatemalan delegation adheres to the American proposition, but on the condition that the Government may not accept arbitration which is therein provided, except when alien nationals, in conflict with the Government for the collecting of ordinary debts arising from contracts, shall have exhausted all legal recourses made available to them by the constitutive laws of the country. In view of the fact that the American proposition does not refer to public debts arising from loans, the Guatemalan delegation desires to state that in this respect it adheres to the principles stated by our eminent colleague, Mr. DRAGO.

His Excellency Mr. **A. Beernaert** states that the Belgian delegation has not been sufficiently enlightened by the discussions that have taken place with regard to the proposition of General PORTER. Therefore, it will abstain from taking part in the vote.

His Excellency Mr. **Hagerup** states that he will vote the proposition with the same reservations that have been presented by the delegations from Spain and from Italy.

His Excellency Mr. **Hammarskjöld** makes the following declaration:

I cannot support by an affirmative vote the American proposition concerning the limitation of the employment of force for the recovery of ordinary public debts having their origin in contracts. This proposition as formulated seems to be an indirect sanction to the employment of force in all cases not expressly covered. Even a State absolutely above all suspicion in fulfilling its obligations cannot well desire that armed execution be partially sanctioned, thus leading to misunderstanding and abuse.

[307] Mr. **Francisco Henriquez i Carvajal** explains his vote as follows:

The delegation of the Dominican Republic understands that the guaranty referred to in the proposition of the delegation of the United States of America can be no other than of an exclusively pecuniary nature, not implying in any case territorial occupation, and which must always be compatible with the sovereignty of the State which in no circumstances can be affected by the arbitral decision. It is with this reservation that the delegation of the Dominican Republic accepts the proposition of the delegation of the United States of America.

His Excellency Mr. **Milovan Milovanovitch** states that the Serbian delegation will vote the proposition of General PORTER under the same reservations that have already been formulated by the delegations from Spain and from Italy.

His Excellency Mr. **Carlin** makes the following declaration:

The Swiss delegation will abstain in the vote about to be taken and for the following two reasons: in the first place because of the declaration it has made in the meeting of July 18, and in the next place because its proposition, requesting that action be taken even now with regard to the matter of a special act, has not been accepted by the subcommission.

Major General **Vrban Vinaroff** states that he will vote in favor of the proposition of General PORTER under the same reservations as have been formulated by the delegation of Italy.

Count **de Villers** speaks as follows:

The Luxemburg delegation will abstain from taking part in the vote because of the very special situation in which the Grand Duchy of Luxemburg has been placed by the London Treaty of 1867, by which it is put into a position of permanent neutrality under the guarantee of the great signatory Powers of this treaty.

His Excellency Mr. **Crisanto Medina** makes the following declaration:

The Nicaraguan delegation adheres to the American proposition, but under the same reservations as have been formulated by the delegate of the Argentine Republic.

His Excellency Mr. **Claudio Pinilla** states that he concurs in the attitude taken by the Hellenic delegation.

His Excellency Count **Tornielli** desires to elucidate a very specific point.

It is agreed that a vote is going to be taken not upon the text, but upon the principle of the proposition of General PORTER?

The **President** replies by stating that there can be no possible misunderstanding in this respect; the Commission is about to vote upon the matter of considering the principle.[1]

As regards the text, it will devolve upon the committee of examination to come to an agreement upon it and also to the place to be assigned to it, and, after having been approved by the Commission, to transmit it to the Drafting Committee. No mistake is therefore possible.

The PRESIDENT puts the proposition of General PORTER to a vote.[2]

Voting for: Germany, United States of America, Argentine Republic, Austria-Hungary, Bolivia, United States of Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatamala, Haiti, Italy, Japan, United States of Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Serbia, Siam, Uruguay.

[308] *Abstaining:* Belgium, Greece, Luxemburg, Roumania, Sweden, Switzerland, Turkey and Venezuela.

Total: Yes, 36; abstentions, 8.

The Italian delegation included in its vote the reservations derived from the remarks which it submitted.

Upon the result of this vote, the **President** declares that the proposition of General PORTER is now taken under consideration: he declares that, in consequence, it will be submitted to study by the committee of examination which will examine it as soon as possible and adopt a text to be submitted to the Commission.

The PRESIDENT then requests the Commission to pass on to the second vote which it is to take, that is to say, to the taking under consideration of various propositions relative to obligatory arbitration. The Commission has closed the general discussion with regard to this matter. It must now proceed to the facts; but, it is impossible for the Commission to make a choice or to come to an agreement upon the various propositions that have been submitted until these propositions, some of which are so very different from others, have been previously classified, discussed and examined.[1]

This will be the task of the committee of examination,[3] if the Commission desires to entrust this matter to it. Subsequently, the Commission will express itself upon the conclusions of the committee of examination. In this manner we shall be made sure of two indisputable stages, exclusive of the definitive consecration of the vote in plenary Conference.

Agreeing to the judgment expressed by the PRESIDENT, the Commission unanimously votes for the taking into consideration of the various propositions dealing with obligatory arbitration and for their reference to the committee of examination.

Upon the motion of several members, the PRESIDENT advises with the Commission to see if it would not be proper, as he believes it is, to add several members to the committee of examination, especially chosen from the authors of the propositions to be examined: this would be an act of equity and of courtesy.

[1] See p. 305 [303].
[2] Annex 50.
[3] [Committee A.]

The PRESIDENT believes that it would be well to add to the committee of examination new members representing some of the delegations that have submitted propositions. He proposes the names of their Excellencies, Messrs. HAMMARSKJÖLD, MILOVANOVITCH, DE LA BARRA, CARLIN and Mr. LANGE.

To these should be added his Excellency, Mr. LUIS DRAGO, whose great competence will be most useful to the committee: and it goes without saying that his Excellency, General PORTER will, with his customary eloquence, jointly with Mr. SCOTT, appear himself to support his proposition. (*Unanimous consent.*)

The PRESIDENT states that the subcommission has come to the end of the consideration of Chapter I of Part IV of the Convention of 1899.

The program of the next meeting will therefore call for the discussion of the propositions concerning the establishment of a permanent arbitration court. This meeting will be fixed, not for next Tuesday (the day for the placing of the corner stone of the Peace Palace), but for Thursday; the meeting of Thursday will be postponed to Saturday.

The meeting closes at 5 o'clock.

NINTH MEETING

AUGUST 1, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:45 o'clock.

The minutes of the eighth meeting are adopted. A typographical error distorting the intervention of his Excellency Count TORNIELLI will be rectified.

The **President**: Gentlemen, the program of the day calls for a continuation of the reading of the Convention of 1899, beginning with Article 20, Chapter II, of the Permanent Court.

You have before you the synoptical table which presents the proposed modifications to the articles of this Convention. You will, no doubt, join with me in an expression of thanks that I wish to convey to the members of the secretariat for the enlightened zeal and activity of which they have given us new proof in acquitting themselves of this work. (*Applause.*)

His Excellency Mr. **Choate**, the first delegate of the United States, makes the following address in English, and Baron D'ESTOURNELLES DE CONSTANT then summarizes it in the French language.[1]

Mr. PRESIDENT: In commending to the favorable consideration of the subcommission the scheme which our delegation has embodied in a proposition relative to the Permanent Court of Arbitration,[2] I cannot better begin what I have to say than to quote a sentence from the letter of President ROOSEVELT to Mr. CARNEGIE on the fifth of April last, which was read at the Peace Congress held at New York. He says:

> I hope to see adopted a general arbitration treaty among the nations, and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries so as to make it increasingly probable that in each case that may come before them they will decide between the nations, great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at The Hague, but it seems to me that this of a general arbitration treaty is perhaps the most important.

[310] And our instructions are to secure, if possible, a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented, and that the court shall be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointments to it, and that the whole world will have absolute confidence in its judgments.

[1] Mr. CHOATE'S remarks, which in the original *Proceedings* appear in English as an annex to the minutes, are here printed in full. See footnote, *post*, p. 331.

[2] Annex 76.

There can be no doubt, Mr. President, of the supreme importance of the step in advance which we ask the Conference to take in developing and building up, out of the Permanent Court of Arbitration created by the Conference of 1899, a tribunal which shall conform to these requirements and satisfy a universal demand which presses upon us from all quarters of the world for the establishment of such a tribunal. The general cause of arbitration as a substitute for wars in the settlement of international differences has advanced by leaps and bounds since the close of the First Peace Conference, and nothing more strongly demonstrates the utility of the great work accomplished by that Conference than the general resort of the nations to agreements for arbitration among themselves as the sure means of securing justice and peace and avoiding a resort to the terrible test of war.

Our plan, if adopted, will preserve and perpetuate the excellent work of the First Conference and carry it to its logical conclusion. Following the noble initiative of Lord PAUNCEFOTE, that great and wise statesman who was the first delegate of Great Britain, whose persuasive words upon the subject will never be forgotten, the First Conference, after establishing for all time the principles of arbitration, created a tribunal to which all nations, whether signatory Powers or not, might voluntarily resort for the determination of all arbitrations upon which they might agree. But one cannot read the debates which ushered in the taking of that great step by the First Conference without realizing that it was undertaken by that body as a new experiment and not without apprehension, but with an earnest hope that it would serve as a basis, at least, of further advanced work in the same direction by a future conference. The project was as simple as the purpose of it was grand, but, as Mr. ASSER has well said in his eloquent speech, it created a court in name only by furnishing a list of jurists and other men of skill in international law from whom the parties to each litigation might select judges to determine the case, who should sit at The Hague according to machinery provided for the purpose, and proceed by certain prescribed methods, if no others were agreed upon by the parties.

We have with us, I believe, as members of the present Conference, some seventeen members of the former Conference who participated in that great work, and about an equal number of the judges whose names were placed upon the list by the various nations in conformity with the power given them by the Convention of 1899. And our present effort is by no means to belittle or detract from their work, but to build upon it a still nobler and more commanding structure, and it is their support that we would seek especially to enlist in this new undertaking.

We do not err, Mr. President, in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, and to draw to the Hague Tribunal for decision any great part of the arbitrations that have been agreed upon; and that in the eight years of its existence only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of the court at least two-thirds have not, as yet, been called upon for any service. It is not easy, or perhaps desirable, at this stage of the discussion to analyze all the causes of the failure of a general or frequent resort by the nations to the Hague Tribunal, but a few of them are so obvious that they may be properly suggested. Certainly it was for no lack of adequate and competent and distinguished judges, for the services they have performed in the four cases which

they have considered, have been of the highest character, and it is out of those very judges that we propose to constitute our new proposed court.

I am inclined to think that one of the causes which has prevented a more [311] frequent resort of nations to the Hague Tribunal, especially in cases of ordinary or minor importance, has been the expensiveness of a case brought there; and it should be one element of reform that the expense of the court itself, including the salaries of the judges, shall be borne at the common expense of all the signatory Powers, so as to furnish to the suitors a court at least free of expense to them, as is the case with suitors of all nations in their national courts.

The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact it has thus far been a court only in name,—a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good as far as it has been permitted to work at all, but our efforts should be to try and make a tribunal which shall be the medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

Let us then seek to develop out of it a permanent court, which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations. By such a step in advance we shall justify the confidence which has been placed in us and shall make the work of this Second Conference worthy of comparison with that of the Conference of 1899.

We have not, Mr. President, in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the president to consider them.

The plan proposed by us, Mr. President, does not in the least depart from the voluntary character of the court already established. No nation can be compelled or constrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods and to avoid the terrible consequences and chances of war.

In the first article of our project we suggest that such a permanent court of arbitration ought to be constituted; and that is the great question of principle to be first decided. And to that end we submit that it should be composed of not more than seventeen judges, of whom nine should be a quorum,—men who have enjoyed the highest moral consideration and a recognized competence in questions of international law; that they shall be designated and elected by the nations, but in a way prescribed by this entire Conference, so that all the nations, great and small, shall have a voice in designating the manner of their choice; and

that they shall be chosen from so many different countries as fairly to represent all the different systems of existing law and procedure, all the principal languages of the world, all the great human interests, and a widely distributed geographical character; that they shall be named for a certain number of years, to be decided by the Conference, and shall hold their offices until their respective successors, to be chosen as the conference shall prescribe, shall have accepted and qualified.

[312] Our second article, Mr. President, provides that our Permanent Court shall sit annually at The Hague upon a specified date, the same date in each year, to be fixed by the Conference, and that they shall remain in session as long as the necessity of the business that shall come before them may require; that they shall appoint their own officers and, except as this or the preceding Conference prescribes, shall regulate their own procedure; that every decision of the court shall be by a majority of voices, and that nine members shall constitute a quorum, although this number is subject to the decision of the Conference.

We desire that the judges shall be of equal rank, shall enjoy diplomatic immunity, and shall receive a salary, to be paid out of the common purse of the nations, sufficient to justify them in devoting to the consideration of the business of the court all the time that shall be necessary.

By the third article we express our preference that in no case, unless the parties otherwise agree, shall any judge of the court take part in the consideration or decision of any matter coming before the court to which his own nation shall be a party. In other words, Mr. President, we would have it in all respects strictly a court of justice, and not partake in the least of the nature of a joint commission.

By the fourth article we would make the jurisdiction of this Permanent Court large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign States, which they had not been able to settle by diplomatic methods, and which shall be submitted to it by an agreement of the parties; that it shall have not only original jurisdiction, but that room shall be given to it to entertain appeals, if it should be thought advisable, from other tribunals, and to determine the relative rights, duties, or obligations arising out of the sentences or decrees of commissions of inquiry or specially constituted tribunals of arbitration.

Our fifth article provides that the judges of the court shall be competent to act as judges upon commissions of inquiry or special arbitration tribunals, but in that case, of course, not to sit in review of their own decisions, and that the court shall have power to entertain and dispose of any international controversy that shall be submitted to it by the Powers.

And finally, by Article 6, that its membership shall be made up as far as possible out of the membership of the existing court, from those judges who have been or shall be named by the parties now constituting the present Conference, in conformity with the rules which this Conference shall finally prescribe.

Mr. President, with all the earnestness of which we are capable, and with a solemn sense of the obligations and responsibilities resting upon us as members of this Conference, which in a certain sense holds in its hand the fate and fortunes of the nations, we commend the scheme which we have thus proposed to the careful consideration of our sister nations. We cherish no pride of opinion as to any point or feature that we have suggested in regard to the constitution and

powers of the court. We are ready to yield any or all of them for the sake of harmony, but we do insist that this great gathering of the representatives of all the nations will be false to its trust, and will deserve that the seal of condemnation shall be set upon its work, if it does not strain every nerve to bring about the establishment of some such great and permanent tribunal which shall, by its supreme authority, compel the attention and deference of the nations that we represent, and bring to final adjudication before it differences of an international character that shall arise between them, and whose decisions shall be appealed to as time progresses for the determination of all questions of international law.

Let us then, Mr. President, make a supreme effort to attain not harmony only, but complete unanimity in the accomplishment of this great measure, which will contribute more than anything else we can do to establish justice and peace on everlasting foundations.

[313] The Commission will distinctly understand that our proposed court, if established, will not destroy but will only supplement the existing court, established by the Conference of 1899, and that any nations who desire it may still resort to the method of selecting arbitrators there provided.

Gentlemen, it is now six weeks since we first assembled. There is certainly no time to lose. We have done much to regulate war, but very little to prevent it. Let us unite on this great pacific measure and satisfy the world that this Second Conference really intends that hereafter peace and not war shall be the normal condition of civilized nations. (*Hearty applause.*)

Mr. **James Brown Scott** explains the views of the American delegation as follows:

In the opening the National Arbitration and Peace Congress in the city of New York, on the fifteenth day of April, 1907, the Hon. ELIHU ROOT, Secretary of State for the United States of America, expressed, in a few apt paragraphs, the causes which have worked against general arbitration and the reasons which have prevented a more frequent recourse to the Permanent Tribunal of Arbitration at The Hague. I therefore beg to quote the following passages from his address:

> It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial tribunal; it is rather an apprehension that the tribunal selected will not be impartial. In a dispatch to Sir JULIAN PAUNCEFOTE, dated March 5, 1896, Lord SALISBURY stated the difficulty. He said that
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> "If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their sympathies, men wish for the victory of one side or another. Such conflicting sympathies interfered most formidably with the choice of an impartial arbitrator. It would be too invidious to specify the various forms of bias by which, in any important controversy between two great Powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment each great Power could point to nations whose admission to any jury, by whom its interests were to be tried, it would be bound to challenge; and in a litigation between two great Powers the rival challenges would pretty well exhaust the catalogue of the nations from which

competent and suitable arbiters could be drawn. It would be easy, but scarcely decorous, to illustrate this statement by examples. They will occur to anyone's mind who attempts to construct a panel of nations capable of providing competent arbitrators, and will consider how many of them would command equal confidence from any two litigating Powers.

"This is the difficulty which stands in the way of unrestricted arbitration. By whatever plan the tribunal is selected, the end of it must be that issues in which the litigant States are most deeply interested will be decided by the will of one man, and that man a foreigner. He has no jury to find his facts; he has no court of appeal to correct his law; and he is sure to be credited, justly or not, with a leaning to one litigant or the other."

The feeling which Lord SALISBURY so well expressed is, I think, the great stumbling-block in the way of arbitration. The essential fact
[314] which supports that feeling is that arbitration too often acts diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments, and the sense of honorable obligation which has grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honorable obligation which characterizes the judicial department of civilized nations. Instead of the sense of responsibility for impartial judgment, which weighs upon the judicial officers of every civilized country, and which is enforced by the honor and self-respect of every upright judge, an international arbitration is often regarded as an occasion for diplomatic adjustment. Granting that the diplomats who are engaged in an arbitration have the purest motives; that they act in accordance with the policy they deem to be best for the nations concerned in the controversy; assuming that they thrust aside entirely in their consideration any interests which their own countries may have in the controversy or in securing the favor or averting the displeasure of the parties before them, nevertheless it remains that in such an arbitration the litigant nations find that questions of policy, and not simple questions of fact and law, are submitted to alien determination, and an appreciable part of that sovereignty which it is the function of every nation to exercise for itself in determining its own policy is transferred to the arbitrators. . . .

What we need for the further development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility. We need for arbitrators not distinguished public men concerned in all the international questions of the day, but judges who will be interested only in the question appearing upon the record before them. Plainly this end is to be attained by the establishment of a court of permanent judges, who will have no other occupation and no other interest but the exercise of the judicial faculty under the sanction of that high sense of responsibility which has made the courts of justice in the civilized nations of the world the exponents of all that is best and noblest in modern civilization.

It is a familiar doctrine that the shoemaker should stick to his last and that he should not go beyond it. It should be an equally familiar doctrine that lawyers and jurists of reputation are preeminently qualified to deal with questions relating to the organization and development of a court of justice. The opinion is not expressed, either directly or indirectly, that the layman should not have views upon this subject, and express them, but it would seem to be unarguable that the advice of the bench and the bar should be determinative in all questions relating to courts of justice.

The plan which the American delegation has had the honor to lay before the Conference is the result of direct instructions from the secretary of state, who is not only a lawyer of distinction but a leader of the bar. The explanation of the general principles relating to the establishment of a permanent court comes from our distinguished first delegate, who led the American bar as long as he chose to remain in active practice.

It would seem, therefore, that a project outlined by one practitioner of distinction, and commended to your careful consideration by another no less distinguished member of the profession, must possess qualities which commend it to the consideration of the profession at large.

The American people, rightly or wrongly, are regarded as preeminently practical, and a project which commands their unanimous support, because it expresses their innermost desire, must be practical in the broadest sense of the term. But we believe that the project for the establishment of a permanent court will not merely commend itself to practitioners, but that it is susceptible of theoretical defense.

[315] Before entering upon the detailed exposition of the project and presenting the fundamental principles underlying the proposed permanent court, I desire to call attention to the present court and to show its strength and its weakness, in order that it may appear that our project develops the strength on the one hand and eliminates the weakness on the other.

The strength of the work of 1899 lies in the *idea* of a court for the settlement of international differences; its weakness consists in the fact that the machinery provided is inadequate for its realization.

I quote the following articles from the Convention of 1899:

> ARTICLE 15. International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.
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> ARTICLE 16. In questions of a legal nature, especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.
>
> ARTICLE 17. The arbitration convention is concluded for questions already existing or for questions which may arise eventually. It may embrace any dispute or only disputes of a certain category.
>
> ARTICLE 20. With the object of facilitating immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a permanent court of arbitration, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention.

The intent of the framers of this remarkable convention is evident: arbitration is to take up the task of settlement where diplomacy has failed, and reason thus thrusts itself between negotiation and the sword.

The signatory Powers agreed to organize a permanent court of arbitration, and this court, so organized, was to be accessible at all times. It is common knowledge that no permanent court exists because no permanent court ever was established under the Convention, and it necessarily follows that if a permanent court does not exist, it is not accessible at all times, or indeed at any time. The most that can be said is that the signatory Powers furnished a list of judges

from which, as occasion required, a temporary tribunal of arbitration might be composed.

It would further appear that the judges so appointed by the signatory Powers were not necessarily judges in the legal sense of the word, but might be jurists, negotiators, diplomatists, or politicians specially detailed. In a word, the Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges.

A careful examination of the sections previously quoted shows beyond peradventure that the framers contemplated the establishment of a court of justice to which differences of an international nature might be submitted for judicial consideration and decision.

Article 15 speaks of "judges of their choice," and indicates in no uncertain measure that the decision is to be based upon "respect of law." Article 16 lays stress upon questions of a judicial nature and declares that arbitration is recognized as the most efficacious and the most equitable method of setting conflicts of this nature.

[316] It requires neither argument nor intellectual acumen to discover the intent of the Convention in the wording and in the spirit of the act itself.

To decide as a judge, and according to law, it is evident that a court should be constituted, and it is also evident that the court should sit as a judicial, not as a diplomatic or political, tribunal. Questions of special national interest should be excluded because the intent clearly is to decide a controversy not by national law but by international law. A court is not a branch of the foreign office, nor is it a chancellery. Questions of a political nature should likewise be excluded, for a court is neither a deliberative nor a legislative assembly. It neither makes laws nor determines a policy. Its supreme function is to interpret and to apply the law to a concrete case.

The court, therefore, is a judicial body composed of judges whose duty it is to examine the case presented, to weigh evidence, and thus establish the facts involved, and to the facts thus found to apply a principle of law, thus forming the judgment. It follows, then, that only questions capable of judicial treatment should be submitted, and that the duty of the judge should be limited to the formation of judgments. The desideratum is that a law and its interpretation should be certain, and certainty of judgment is possible only when strictly judicial questions are presented to the court. Upon a given state of facts you may predicate a judgment. If special interests be introduced, if political questions be involved, the judgment of a court must be as involved and confused as the special interests and political questions.

In stating boldly that the court should not deal with questions of special national interest, nor with questions of national policy, and in expressing the opinion that judges should decide according to the law as judges, not as negotiators or diplomats, it is not meant to suggest that experience in political or diplomatic life would disqualify a judge for the performance of judicial duties. As the politician deals with political questions, he is clearly out of place in a court of justice, although a broad experience in political affairs may strengthen the judgment of the individual judge and thus enhance his efficiency. The diplomat, as such, is likewise out of place in a court of justice, because we can not always expect him to weigh the claim of one against the other and strike a

balance. Experience, however, in diplomatic life is of value, indeed of great value, but it can only enlarge the view and thus increase the usefulness of the judge individually. Political experience and diplomatic training cannot make up for the lack of the judicial mind and the legal way of thought.

It is difficult to conceive of a court of justice without judges trained in the administration of justice. It is as difficult,—indeed it is wellnigh impossible,—to think of a court without at one and the same time having in mind the jurisdiction of the court. An international court does not compete with a national court. The questions submitted to it are not of a national or municipal character. They are of an international character, to be determined according to international equity and international law. It necessarily follows that the jurisdiction of such a court would be different from the jurisdiction of a national court. The one point in common is that each should have a certain sphere of jurisdiction if it is to function as a court. In what, then, may the jurisdiction of an international court consist? Clearly it can have no original jurisdiction. Its jurisdiction must be conferred upon it specifically, for when created it is as powerless and helpless as the new-born babe. The jurisdiction must be conferred upon it expressly, and it would seem that this may happen in several ways. First, the signatory Powers may conclude a *general* treaty of arbitration and may agree that all differences of an international nature shall be considered. Or, secondly, if the signatory Powers do not conclude a general agreement, the positive jurisdiction of the court may be based upon the separate treaties of arbitration already concluded between the nations.

[317] In either case the court will be clothed with a certain jurisdiction; for, as the Powers have agreed collectively or singly to refer certain matters to the Permanent Court, it follows that the court possesses the competence to examine these. In a word, the court possesses obligatory jurisdiction in certain defined and ascertained cases.

But it may well happen that nations may, in the absence of a treaty of arbitration, be willing to submit special differences arising between them to the judgment and determination of the court. As the jurisdiction in such cases would be occasional, and as it would depend wholly upon the volition of the parties in controversy, it may be called voluntary or facultative jurisdiction. It is a matter of no great importance whether the jurisdiction is obligatory or whether it is facultative, provided only that questions be submitted to the court for their determination. And it is believed that particular questions will be submitted to the court as soon as the court justifies its existence, and that these submissions will be more frequent in proportion as the court wins universal confidence and trust. It is therefore no objection to the court that the obligatory jurisdiction may be small, provided only that the facultative jurisdiction be large. And it will, in the nature of things, be large if the court be permanent, if it be composed of judges, and if the decisions of the judges satisfy the judicial conscience.

The very permanency of the court will go far to create the confidence which a line of carefully considered and authoritative precedents will justify. For it is important that the court and its personnel be permanent in order that a permanent body of international doctrine be developed. Each decision will be a milestone in the line of progress and will forecast a highly developed, comprehensive, and universal system of international law. But to create a precedent

and to secure its recognition it is necessary that the decision itself shall be impartial, according to the law of the case, and the surroundings of the court should be such as to allay suspicion of partiality. Judges of training and experience, serving for years instead of for a few weeks, will develop a judicial faculty, although its presence be not so marked at the date of appointment. An arbiter, chosen for a particular purpose by a particular Government, after an examination of his writings or utterances, may be discredited in advance and doubts cast upon his impartiality, because it is well known that nations as well as men are inclined to appoint those favorable, not those unfavorable, to their views. There is, therefore, great danger that the arbiter be but slightly removed from the advocate; whereas the judge, by virtue of his tenure, cannot, in the nature of things, be exposed to this danger or to this criticism. It is not too much to say, therefore, that the confidence which the court may inspire will depend as much upon the permanence of tenure as upon the character and attainments of the individual judges.

It is probable that the views already presented will meet with general acceptance, but the main question still remains, How is this Permanent Court, composed of judges, to be constituted? No attempt is made to disguise the difficulties of this question; for if it were an easy task, we would not be engaged in discussing it in this year of grace 1907.

It is obvious at the outstart that a court, to be truly international, should represent not only one or many but all nations. It is equally obvious that a court composed of a single representative from each independent and sovereign nation would be unwieldy. Forty-five judges, sitting together, might compose a judicial assembly; they would not constitute a court.

In international law all States are equal. As our great Chief Justice MARSHALL said:

> No principle of general law is more universally acknowledged than [318] the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates itself, and its legislation can operate on itself alone.

It follows, then, that however desirable a permanent court may be, it cannot be imposed upon any nation. The court can only exist for this nation by reason of its express consent. If it be said that all States are equal, it necessarily follows that the conception of great and small Powers finds no place in a correct system of international law. It is only when we leave the realm of law and face brute force that inequality appears. It is only when the sword is thrown upon the scales of justice that the balance tips; or, to quote the fine words of our honored president, Mr. LÉON BOURGEOIS, uttered in a moment of inspiration:

> Gentlemen, what is now the rule among individual men will hereafter obtain among nations. Such international institutions as these will be the protection of the weak against the powerful. In the conflicts of brute force, where fighters of flesh and with steel are in line, we may speak of great Powers and small, of weak and of mighty. When swords are thrown in the balance, one side may easily outweigh the other. But in

the weighing of rights and ideas disparity ceases, and the rights of the smallest and the weakest Powers count as much in the scales as those of the mightiest.

In matters of justice there can be no distinction, for every State, be it large or small, has an equal interest that justice be done. If, therefore, a permanent court be constructed upon the basis of abstract right, equality and justice, it would follow that each State would sit, of right within an international tribunal, and we will be confronted with a list of judges,—with a panel, not a court. Recognizing the equality of right and the equality of interest in law, and giving full effect to this equality in the constitution of a permanent court, we must yet find some other principle upon which to base it if we wish to erect a small court of a permanent nature.

Fortunately another principle exists. While all States are equal in international law, and while their interest in justice is the same, or should be the same, there is a great difference between nations considered from the standpoint of material interests. And fortunately material interests are independent of the question of power, for power, in the international sense of the word, means physical force, and physical force is alien to the conception of right. The principle of construction cannot be based upon the relative strength or weakness of nations.

But while nations have an equal interest in justice in the abstract, this interest may manifest itself more frequently in the concrete. The interests of a large and populous State are widespread, indeed universal, and complications and differences are most likely to arise where these interests come into conflict. It cannot be said that lawsuits bear a mathematical and constant relation to population. But there is a sensible relation between population, wealth and industry on the one hand and lawsuits on the other. If we compare the States of the American Union, we will see at a glance that the law reports of the State of New York compared with the law reports of Rhode Island and Delaware, our smallest States in population as well as in size, show the greater material interest in the State of New York in courts of justice. A recourse to the courts of justice in New York seems to be the rule, while in the smaller States it would seem to be the exception. It follows, therefore, in practice as in theory, that the State of New York has many more law courts and infinitely more judges, simply because the needs of the population are in this way met.

The foregoing illustration would apply to an international as well as to a municipal or national court. The greater the population, the greater the business; the greater the business, the more frequent the conflict of interests involving a recourse to a court of justice. An international court would seem to be at the present day as much a necessity as the municipal court is a necessity, for international interests, in their infinite variety and complexity, would or should be referred to an international court, just as conflicts arising wholly within one jurisdiction are referred to the municipal court of the particular nation in question. The municipal court is created to meet the national need. An international court should be created and exist to meet the international need, and it is not to be expected that nations with great material interests will be
[319] content to support or accept an international court which does not recognize these interests, and in which these interests are not represented. Material

interests may, however, be very large or may be very small, and the difficulty of estimating the value of a particular interest, and the extent to which it should find representation in a court, would seem to render it either impossible or inexpedient as a basis for the constitution of an international court.

It has been stated—and any geography or gazetteer will furnish the proof—that material interests and populations go hand in hand; that a large population has, by reason of its largeness, material needs which must be satisfied; that industry and commerce spring up to meet these needs, and in satisfying them wealth results. If, therefore, population draws to itself industry and commerce, and if courts of justice, in a civil and commercial sense, are created to resolve commercial or civic differences, it would seem that population (which is easily determinable) may be chosen as a basis of representation because of the direct relation existing between population on the one hand and industry and commerce on the other. Population is a natural principle, and a court of justice based upon the principle of population thus recognizes an actual and natural principle. Business interests are at one and the same time likewise recognized, and justice is administered clearly and impartially, if only the personnel of the court be properly selected.

Admitting that population may be taken as an element upon which to constitute an international court, it is necessary to state, with clearness and precision, the population which shall give a unit of representation. If the required population be very small, it follows that the membership of the court, chosen in accordance with population, will be very large; and, on the other hand, if a very high degree of population be required, it follows that the membership of the court will be correspondingly small.

It is therefore necessary to choose the golden mean in such a way that the membership of the court shall not be so large as to make it unwieldy, nor so small as to leave unrepresented important international interests. It seems probable that a court composed of fifteen or sixteen judges would be manageable, and adequate for all our present international needs.

If it be true that population and material interests bear a sensible proportion to each other, it follows that the entire population of a country should be included, and that its right to representation should depend upon this combined population, for it is not merely the interests of the home country, but the interests of the colonies, that come before courts of justice.

But if we adopt the principle of population as a satisfactory basis for the erection of a court of arbitration, it does not follow that we have by that fact alone constituted it. The establishing, approximately, of the number of judges is indeed a step forward, but it is still necessary to determine the law which they themselves should apply. The problem is here complicated by the coexistence of many systems of law, all of which should be properly represented. Different legal systems prevail in the various States, but an international court should embrace the different legal systems of the world. It should judge according to equity and law which is the resultant of all legal systems and not of some one of them. The jurist is perforce influenced by the system under which he has received his legal education; it should therefore be necessary to have judges versed in the different systems. In order to meet the aim of permanent arbitra-

tion, domestic law must be international. It is only thus that judgment will be equitable from the international point of view.

It is stated that a jurist is the product of his training. It is likewise true that the individual is influenced by the environment, and possesses, in a higher or less degree, the characteristics of his nation. It would be futile—if, indeed, it were possible—to denationalize a judge. But the presence in the court of judges trained in the various systems of law, and representing in their intellectual development characteristics of their respective nations, would go far towards engendering an international spirit.

[320] The project which the American delegation has the honor to present recognizes the existence of the various systems of law and gives adequate representation to them.

For example, the Roman law, constituting the basis of so many European systems, would be represented in its present and modified forms. The common law of England would be represented, and the common law of England as modified in the western world would not be overlooked. The nations of Europe which have given law to the western world would sit, of right, in the court, and at one and the same time the modifications of this law, to meet the needs of the New World, would be before the court. For example, the law of Spain—the source of law in Latin America—would appear both in its European and American form.

The question of language is one of great difficulty, and languages as such should be represented in the court. To one sitting in the Conference day by day and observing the difficulty with which the idea clothes itself in French form, it must be a matter of great importance that the languages should find representation in the court, so that the judge and client may be upon speaking terms.

If a question of Spanish law is involved, it is important that the judge understand Spanish. If a matter of Russian law be under consideration, a knowledge of Russian might well be fundamental. An examination of the American project shows that the principle of population does ample justice to the languages most widely spoken at the present day.

Finally, a court, to be international, must take note of the existence of the nations of the world, and these nations must find adequate representation in the court. The principle of population adopted shows that the four quarters of the globe would be represented in the court.

It may have seemed strange, at first sight, that the American project bases itself upon the principle of population, but when it is seen that the principle of population does justice to the industry and commerce of the world; that it likewise represents the various systems of law; that it includes within itself the languages, and that political geography is not overlooked, it becomes at once evident that the principle of population was selected not for any virtue of its own but because it adequately and equitably represents and embodies the elements essential to the constitution and operation of a permanent court of arbitration.

In a word, our principle recognizes the existence of nations, and their continued existence, as political units, but declares solemnly that for the purposes of justice there is but one people.

In the observations which I have had the honor to submit I have dwelt upon the fundamental underlying principles of the American project without considering matters of detail. Did time permit, it could easily be shown how a permanent court of arbitration, composed of fifteen or sixteen judges, would fulfill the mission now confided to other and variously constituted bodies.

For example, should parties to a controversy desire a summary proceeding, they might request a special detail of three or five judges from the Permanent Court of Arbitration by striking alternately from the list an equal number until the desired number remained. Powers desiring to form a commission of inquiry for a particular purpose could resort to the Permanent Court of Arbitration and constitute a commission in the above-described manner, and add thereto an equal number of nationals from each of the parties. It would require no great powers of imagination to devise a method by which the personnel of the Permanent Court of Arbitration might be modified to meet regulations and requirements of a court of prize; and finally, by special consent of the parties to a controversy, decisions of commissions of arbitration might be referred to the Permanent Court of Arbitration to be reviewed and revised, or to have the relative duties and liabilities under the findings submitted to further examination.

Without considering further details, and without prolonging a discourse already long, I beg to express the conviction that the mere existence of a permanent court of arbitration, composed of a limited number of judges trained in municipal law and experienced in the law of nations, would be a guarantee of peace. As long as men are what they are, and nations are formed of ordinary men, we shall be exposed to war and rumors of war. The generous and high-minded may seek to ameliorate the evils and misfortunes of armed conflict,
[321] but it is certainly a nobler task, and a more beneficent one, to remove the causes which, if unremoved, might lead to a resort to arms. The safest and surest means to prevent war is to minimize the causes of war and to remove, as far as possible, its pretexts. Justice, as administered in municipal courts, has done away with the principle of self-help and the use of force as a means of redress. An international court where justice is administered equally and impartially to the small as well as to the great will go far to substitute the rule of law for the rule of man, order for disorder, equilibrium for instability, peace and content for disorder and apprehension of the future. To employ the language of a distinguished colleague, Mr. MARTENS, the line of progress is *par la justice vers la paix*.

His Excellency Mr. **Martens** expresses himself as follows:

In the name of the Russian delegation, I had the honor, about six weeks ago, to submit a project for the reorganization of the Permanent Arbitration Court.[1]

I feel it my duty to state now the reasons that led our delegation to prepare this project. My task is, furthermore, facilitated by the fine discourse to which we have just listened, of the first delegate of the United States of America.

We are agreed, he said, on one essential and indisputable fact, namely, that the present Permanent Court is not organized as it should be. An improvement

[1] Annex 75.

is needed and it is our task to make it. This task is an important one—indeed, the most important one, in my opinion, of all those devolving upon us.

I have before me the Russian circular of April 3, 1906, which contains the program adopted by all the Powers. It speaks, first of all, of the necessity of perfecting the principal creation of the Conference of 1899—that is, the Permanent Court. The First Conference departed with the conviction that its task would be completed subsequently as a result of the steady progress of enlightenment among peoples, and as the results of acquired experience manifested themselves. Its most important creation, the International Court of Arbitration, is an institution which has already been tested and which has grouped together for the general welfare, as an areopagus, jurisconsults enjoying universal respect.

And in the first point of the program we read: Improvements to be introduced into the provisions of the Convention relative to the pacific settlement of international disputes, as regards the Court of Arbitration and the international commissions of inquiry.

It will be objected, I know, that this matter of improvements to be introduced into the organization of the Permanent Court is perhaps premature. But such an objection cannot cause us to stop.

His Excellency Baron MARSCHALL VON BIEBERSTEIN in his recent discourse has eloquently set forth that arbitration has made great forward steps in the course of the last eight years and that it has won its civic rights, its place in the world.

The first delegate of Germany concluded his discourse by declaring that the idea of a permanency of the Arbitration Court is made necessary.

This cannot be disputed; but, if we will examine the length of the path we have gone, we will discover that in reality, the ideal goal that we seek to attain, lies still far off.

Four arbitration cases have been submitted to the Hague Court within eight years; thirty-three conventions have been signed; these are respectable numbers but insufficient if we are not to be satisfied with mere words.

Have the Powers that have concluded these arbitration conventions sought to strengthen the Hague Court? Not always. They have provided for arbitration, but sometimes they have forgotten all about the Hague Court; so that these conventions attest the oblivion rather than the existence of the court.

[322] It is quite true that improvements are urgent; this is so true that the Argentine delegation has expressed the wish,[1] that chiefs of State should refuse to accept the functions of arbitrator before appeal has been made to the Hague Court.

I do not believe that it is necessary to limit in this matter the freedom of the States. Nevertheless, and without in any way supporting the proposition of the Argentine delegation, I feel it my duty to bring out its significance.

Some years ago, for lack of a court, chiefs of State fulfilled a duty by accepting the functions of arbitrator; they were rendering a very great service. But to-day the situation is no longer the same. The court to which has been submitted an arbitration, assumes all the moral and juridical responsibility of the mission entrusted to it; but when a chief of State is approached, his decision is almost always prepared by a commission or by more or less irresponsible jurists.

[1] Annex 13.

And there is another inconvenience in regard to arbitral decisions rendered by a chief of State: it is the fact that these, as it were, are under no control or at least above all contestation.

And yet, in spite of the court, one is still tempted to resort to the arbitration of chiefs of State. Why is this so? Because, among other reasons, an arbitration decision rendered by a chief of State is without expense; some decorations are distributed and that is the end of it. This, then, proves that the Hague Court is left deserted, among other reasons, because it is too expensive for the parties.

Gentlemen, I shall say nothing further upon this matter. Our arbitration court exists. Day before yesterday we laid the first stone of the edifice.

Our soul has been put into that stone and our devotion to the progress of the institution is unanimous. It remains true, nevertheless, that even those who can give the highest proof of their devotion, acknowledge that the court is in reality nothing but a list of members.

In case of a dispute, the chancelleries must consult this list in order to constitute a court, which is oftentimes a difficult matter and leads to a considerable waste of time. There may be members included in the list of arbitrators who will excuse themselves for one reason or other; there are even some who have agreed to having their name put on the list of arbitrators on the express condition that they should never be called upon to sit.

What then, is this court whose members do not even know one another? The Court of 1899 is but an idea which occasionally assumes shape and then again disappears. This is why the Russian delegation submitted its project, in order to draw the attention of the Conference and to bring about an exchange of views with regard to the matter of the Permanent Court; it does in no way presume to have this project regarded as the sole basis of our discussions. With your permission I will remind you on this occasion that in 1899 we had submitted a project for a permanent court; we withdrew it to take as basis for our discussions the project of Lord PAUNCEFOTE, with the sentiment of conciliation and impersonal devotion that must animate all of us. When we are laboring for the triumph of justice and the welfare of mankind, all matters of self-love and matters of personal ambition must disappear.

We are once more, all of us, ready to efface ourselves in order to form a solution in conformity with the general spirit of our proposition, so that we may make a further step in advance in the path that was opened in 1899.

Gentlemen, I shall now pass on to the text of my proposition, without, however, entering into any premature explanations.

In the first place, it is the principle of the absolute freedom of the Powers in the choice of arbitrators which remains intact. We have retained the [323] idea of the list of arbitrators but we believe that these arbitrators must know each other and be, at least in part, available to the States; this is why we have introduced the idea of periodic meetings during which the members elect the permanent arbitration tribunal. This tribunal will thus be a living organism, ever ready, and at any moment available to the Powers that may wish to have recourse to it. In our project, this permanent tribunal would be composed of three members. But the number of the judges might always be increased; instead of three members one might elect five, seven or nine members. This is a

matter of detail. The advantage of the Russian project consists in the preservation of the existing bases upon which I propose that we rear another edifice more appropriate to the just exigencies of international life.

I have concluded, gentlemen; allow me a few words more from the bottom of my heart. There have always been in history epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a political theory. The most shining example of this kind was the crusades. From all countries arose the cry,

To Jerusalem! God wills it!

To-day the great ideal which dominates our time is that of arbitration. Whenever a dispute arises between the nations, even though it be not amenable to arbitration, we hear the unanimous cry, ever since the year 1899, "To The Hague!"

If we are all agreed that this ideal shall take body and soul, we may leave The Hague with uplifted head and peaceful conscience; and history will inscribe within her annals:

> The members of the Second Peace Conference have deserved well of humanity. (*Prolonged applause.*)

His Excellency Baron **Marschall von Bieberstein:** I declared a few days ago that the German Government considers the establishment of a permanent court of arbitration as a real step in the line of progress.

I wish now, while this discussion is being opened, formally to repeat my declaration in the name of the German delegation. I take real pleasure in accepting the general principles so eloquently defended by the delegates from the United States.

We are ready to devote all our energy toward the accomplishment of this task which Mr. MARTENS very correctly defined, on presenting it, as one of the most important ones of the Second Peace Conference. (*Applause.*)

His Excellency Mr. **Francisco L. de la Barra:** I am going to explain briefly the reasons of the Mexican delegation for respectfully proposing to the Commission an amendment[1] to the proposition presented by the honorable delegates of the United States of America in regard to arbitration.[2]

Generally, this proposition conforms to the aspirations of the civilized world whose wish it is to see the action of arbitration extended by simplifying arbitral procedure and by constituting a permanent tribunal which, through its respectability and its independence gives prestige to that institution. In this way we shall make tangible that which is now, in the eyes of the masses, vague and indefinite, and at the same time we will give greater force to that element of sanction referred to by the distinguished Mr. NYS and which assumes, day by day, a new force and which is called public opinion.

Such is the object of the proposition of the United States which has been published as Annex 21. The spirit that has prompted it is the same that brings

[1] Annex 26.
[2] Annex 21.

us together in this place, and the aspiration that results from it is, one might say, the common factor of our diverse aspirations.

Still, in its first article we find a gap that we take the liberty of calling to the attention of the Commission. This article imposes the obligation of
[324] submitting to the permanent arbitration tribunal all the international disputes which it specifies, without taking into account the fact that special disputes may arise requiring a special jurisdiction. For instance, in case the amount of a pecuniary claim does not, because of its insignificance, warrant recourse to the Hague tribunal.

Mr. MARTENS, with his high authority, just called our attention to some other special cases.

We propose, therefore, to add after the words: "*shall be submitted to the permanent arbitration Court established at The Hague by the Convention of July 29, 1899,*" the following words: "*unless, by mutual agreement the parties should prefer to organize a special jurisdiction.*"

In approving Article 21 of the convention for the pacific settlement of international disputes which grants the right to establish a special jurisdiction, the Conference of 1899 decided "to avoid a too direct action upon the freedom of the States," in accordance with the very clause of the report that has been submitted. The same idea, no doubt, guided the delegation of Germany in its proposition on arbitration, submitted to this Conference; this also impells us now to propose the amendment of which I have just spoken.

Mexico, which at two different times has had recourse to the Hague tribunal and loyally fulfilled the obligations that have been imposed upon her, will enthusiastically concur in any proposition whose object it is to give greater luster to the Permanent Court and to facilitate access thereto. She believes that, in admitting the right of establishing special arbitral jurisdiction by agreement of the parties, a practical and beneficent work will be performed in the interest of arbitration, that is to say, in behalf of peace. (*Applause.*)

His Excellency Sir **Edward Fry**: After having listened to the very important speeches of Mr. CHOATE and of Mr. SCOTT, I do not hesitate in the name of the delegation of Great Britain, to give our cordial support to the principle of the proposition of the United States of America.[1] I hope that after a discussion, as brief as possible, the project will be referred to the committee of examination, and that the latter will also adopt some of the ideas contained in the project presented by Mr. MARTENS, and in particular the idea that the court may always be open. (*Applause.*)

His Excellency Mr. **Carlos Rodriguez Larreta**: Some time ago I presented a project in the form of a *vœu*[2] that sovereigns or chiefs of State, as well as officials and scientific corporations may not accept arbitral functions until after a previous declaration shall have been made by the interested parties that they have been unable to agree upon the organization of a tribunal composed of members of the Permanent Arbitration Court.

In the first place, I shall have to thank his Excellency Mr. MARTENS for the words he has just expressed with regard to our project, for in referring to it, that distinguished man has honored our delegation.

[1] Annex 76.
[2] Annex 13.

I shall now proceed to give you the reasons that served as a basis for my proposition:

That *vœu* tends to incline the States to submit their disputes in the first place to the Hague Court.

The certain result of the proposed resolution would be to enhance in the world the prestige of the high tribunal by reason of the frequent exercise of its functions. To my mind it is a wise political measure thus to guide the signatory Powers without a shadow of obligation toward the jurisdiction established in 1899. These are also the judgments expressed by his Excellency Mr. LÉON BOURGEOIS and by Baron D'ESTOURNELLES DE CONSTANT at the First Peace Conference.

On the other hand, if the present declaration were adopted, it would but express the wish to have repeated in future the example set in 1903 by
[325] Mr. ROOSEVELT, the illustrious President of the United States of America, on the occasion of the dispute between Venezuela and Germany, England and Italy.

Whether the nations accept obligatory arbitration unanimously or not, I believe that the present resolution would indicate an important advance in the work accomplished by the First Conference.

I fulfill, furthermore, the instructions received from my Government: to ratify at this Conference the invariable policy of the Argentine Republic. Our country has proven its sincere adhesion to arbitration and to international justice. Without recourse to violence she has demarcated all her boundaries; she has settled the northern boundaries through her spontaneous agreement with Bolivia; those running along the Cordilleras that separate her from Chile through the arbitration of the King of England; those of the Brazilian boundary through a decision of the President of the United States; finally, the boundaries along the Paraguayan line in virtue of an arbitration treaty, which delegated to the President of the United States the right to determine them. (*Applause.*)

His Excellency Mr. **Luis Drago** states that, prevented from being present at the meeting of this day, his colleague Mr. SAENZ PENA has requested him to read the following declaration which he had drafted in the name of the Argentine delegation:

> In principle, the delegation of the Argentine Republic is in agreement with the project presented by the delegation of the United States of America regarding the creation of a permanent arbitration court,[1] although it supposes that, by its constitution and by its organism this permanent court will offer sufficient guarantees to all the States or groups of States.
>
> We believe, indeed, that the creation of a permanent court, although its jurisdiction were voluntary, constitutes a step toward peace.
>
> Aside from obligatory arbitration to which the Argentine Republic would so gladly set its name together with all the rest of the nations here represented, it seems to us evident that in giving vitality to an international jurisdiction, it might be possible to offer to all the States in dispute a permanent tribunal composed of magistrates of an indisputable competence in matters of international law and enjoying the highest regard from a moral point of view. In doing this, the Conference would have secured a positive result, and something tangible which would be the guarantee of right, and which would undoubtedly constitute a body of jurisprudence capable of guiding in the interpretation of treaties with all the prestige of the highest justice.

[1] Annex 76.

The proposition that is now engaging our attention enumerates a thought that should receive our full approval. But the basis of representation in the Permanent Court will lead to discussions that will be useful and permit us to discover the best and most efficacious means of composing it.

In the thought of the Argentine delegation, representation in that Court must be granted in accordance with the importance of the external commerce of each State because commerce and production are certainly the best criterions of the vitality, of the intelligence, of the work and progress of the nations; that was the basis chosen by William Penn in the seventeenth century when it was thought of creating a universal jurisdiction exercised by a high permanent court in order to settle international disputes. We believe it unnecessary to add that we accept such a jurisdiction which, at all events, would be purely voluntary.

The Argentine Republic has the honor of submitting this suggestion so that it may be studied by the committee of examination when the latter shall examine the proposition of the United States of America.

His Excellency Mr. **A. Beernaert** states that, the hour being late, it will be impossible to exhaust in this meeting the general discussion with regard [326] to a permanent tribunal. But this discussion deserves to be continued for it is of the highest importance; in consequence he asks that it be postponed to the next meeting.

The **President** consults the assembly which concurs in the proposition. The discussion will therefore be continued in the afternoon of next Saturday, and in order to avoid all waste of time, the committee of examination upon arbitration will meet upon the close of the meeting of the subcommission.

His Excellency Count **Tornielli** requests that the articles of the Italian proposition be inserted in the synoptic table [1] opposite the corresponding articles of the Convention of 1899.

It is so ordered.

The meeting closes at 12:45 o'clock.

[The annex to this meeting (pages 327-330 of the *Actes et documents*), being the original English text of Mr. CHOATE's remarks which appear *ante*, pages 312-316, is not printed.]

[1] Annex 69.

[331]

TENTH MEETING

AUGUST 3, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:20 o'clock.

The minutes of the ninth meeting are adopted.

The **President** informs the assembly that he has received from the Dominican delegation a statement of the remarks concerning the proposition of the United States,[1] relative to the recovery of contract debts.[2] This statement will be printed and distributed through the care of the secretariat.

His Excellency Mr. **Choate** states, in the name of the delegation of the United States, that he accepts not only the spirit, but also the text itself of the amendment presented by the Mexican delegation[3] to his project[4] concerning obligatory arbitration.

This amendment clearly outlines the purpose of the American delegation to leave freedom of action to the States to address themselves, either, to the present Hague Arbitration Court, or to the permanent court which it is proposed to establish, or to any other agency for the pacific settlement of their dispute.

The delegation of the United States desires that its project,[5] and that of the Russian delegation,[6] together with the projects of the other delegations, should form the object of one and the same discussion.

The discussion concerning the proposition to create a permanent arbitration court, is continued.

His Excellency Mr. **A. Beernaert**: Before taking the floor I should have greatly desired to reread carefully the important and remarkable discourse of our colleague from the United States, and the declarations which followed: but these documents were distributed to us but a few minutes ago, and for the time being, I shall confine myself to expressing serious fears and to calling for certain information which seems necessary.

As regards the ever-increasing introduction of arbitration into international life, I certainly have no doubt: it is one of the master ideas to which I have consecrated myself. The Interparliamentary Union which is becoming larger, year by year, has no other aim, and for years I have had the unmerited honor of being the president of its central bureau; but again there arises before us
[332] the question which was discussed for such a long time in 1899: Is there an advantage in establishing a really permanent international tribunal in which but few and nearly irremovable judges would have to decide the disputes of

[1] Annex 50.
[2] Annexes 51 and 57.
[3] Annex 26.
[4] Annex 21.
[5] Annex 76.
[6] Annex 75.

the various states of the civilized world? Gentlemen, this is, nay, this certainly is one of the most serious and most difficult problems.

In 1899 the Russian Government proposed the creation of a permanent court, and to that end several plans were suggested. According to one of these plans, the Conference was to designate the Powers which, in case of arbitration, were each to name one judge whose mandate was to continue up to the time of a new meeting of the Conference.

The proposition from the American delegation, especially due to our colleague HOLLS, also proposed a permanent tribunal. Each State was to have in it one representative and his nomination was entrusted to their highest courts of justice. In each particular case, a special regulation determining the number of judges was to be adopted, but after a long and laborious discussion—the special committee held no fewer than seventeen meetings—the proposition of Sir PAUNCEFOTE won the day and was finally and unanimously adopted.

Mr. MARTENS seems to me to have been very severe in his criticism of this work when he spoke the other day.

No doubt, there is no permanent court, and there is not even a court except when there is a dispute; but thanks to the institution of a permanent bureau, to a procedure determined in advance in all its details, and to a panel of judges from which choice is made easy, the arbitral court constitutes itself in a short time whenever such a court is desired, and may I not ask if there is not an advantage found in the fact that we can establish such a court each time, according to the circumstances, to the nature of the dispute, the nationality, legislation and language, etc.?

Mr. MARTENS said that in order to try a suit, jurists and not diplomats are needed. This cannot be gainsaid; but the Conference of 1899 desired to institute a work of justice. Article 15 of the Convention declares that the disputes must be settled *"on the basis of respect for law."*

And the States have so well understood this, that the long list of arbitrators is composed almost entirely of jurists; among them there are many of the highest authority, and of that class were those who have had, up to the present time, to adjudicate the four disputes submitted to the court. No more learned courts, no courts deserving of greater respect could have been secured, and their decisions have been exactly carried out.

That which in the Convention of 1899 comes within the competence of diplomacy, is mediation; and in such case conflicts of interest and of political differences are involved, and such conflicts do not come within the field of arbitration. In the latter there is room for justice only, and the majority for right holds exclusive control.

It has also been said that four disputes settled in eight years is not of much consequence. I agree that the number of the disputes has not been large, but this has not been the fault of the institution; it is the fault of the Governments who seemed to distrust it, as frequently happens with regard to new things, and they sought their arbitrators elsewhere, but not from the lists of The Hague. The situation changed only owing to some few and energetic initiatives, such, for instance as that of Mr. D'ESTOURNELLES in the French Parliament. I can, therefore, not share the feelings of my friend Mr. MARTENS, and the already numerous authors who have written on the work of 1899 are generally of my opinion.

The best qualified of all, Mr. MÉRIGNHAC, approves of the work of The Hague by referring to it as "one of the most telling forward steps in international relations," and I have been pleased to hear Mr. BOURGEOIS use similar words in his opening discourse of the First Commission. Let us now see if the adoption of the propositions of the American delegation would mark a forward step.

[333] In the first place, there arises a question of principle upon which I believe we must all come to an agreement. It is to the effect that if a permanent court is constituted, it will nevertheless be essentially an optional arbitrary jurisdiction and that in each case it will be necessary to secure the willingness of the nations in dispute.

Sovereign States acknowledge no superior; this is the necessary consequence of their sovereignty. They can, therefore, not submit to an outside court, except with regard to facts of private law, or by admitting arbitration, which is here the jurisdiction of the common law.

The Permanent Court would, therefore, be a court of arbitrators; it would sit in judgment of a dispute only in virtue of the common willingness of the litigants, and the latter, if they thought it best, might address themselves to other arbitrators, and especially, might have recourse to the procedure established by the Convention of 1899.

It seems impossible that we cannot be in agreement upon these various matters; but I take the liberty of dwelling upon this for a few minutes, because the notion of a permanent court seems, in the case of some, to rest upon ideas which are neither my own, nor do I believe ideas entertained by most of you.

Vast projects, according to which the reorganized world would henceforth form a single State, or at the least, a federation of States with but a single parliament, a single executive power, a single supreme court of justice, have been laid before the Interparliamentary Conference. A report on this matter was laid last year before our London Assembly.

To my mind, this is a regrettable exaggeration of the current of ideas which is in itself true and is an honor to our century. In the present times it would seem as though great waves of fraternity and of solidarity were moving across the world. Men of divers races know one another and no longer feel that they are mutual enemies. An assembly like the present one, the like of which did not even enter into the dreams of our fathers, no longer astonishes anyone. It is the result of the enormous progress of all the sciences which has done away with distances, established a solidarity of interests and mixed the races.

But, on the other hand, never has the national sentiment been at a higher pitch, and old nations and old languages that we had thought of as having passed to oblivion, are again calling for their place in the sun,—no one of us would renounce his own land, his own and cherished fatherland, and no one would certainly consent to being governed from afar, and hence, ill governed.

Therefore, in my judgment, we must regard as a fearful Utopia, the dream of a world state or of a universal federation, of one sole parliament, of one court of justice supreme over all the nations.

An international court can be but a board of arbitrators, and, as was so excellently said by Mr. BOURGEOIS, the choice of the judge is of the very essence of such a jurisdiction.

Would permanent arbitrators be better than the permanent list of 1899? I do not think so. In the first place, it would be necessary to agree upon the conditions on the basis of which the judges should be appointed. It was the former idea of Russia that each country should have a representative in this institution and that the latter would thus become of very large composition and very costly. Later on it was thought of supplementing the nations in dispute with representatives of their own choosing in the tribunal. The present proposition is simpler. It contemplates an invariable organization and the number of the judges is fixed in the first place at five, and was later on increased to fifteen and then to seventeen.

In itself this is a large number, and it has not yet been shown to me that it would be possible to find seventeen jurists of the first rank willing to expatriate themselves in order to accept a mandate that might keep them but little occupied. But even with this large number, most of the nations would be represented by no judge of their own, and how could we, in such case, secure their confidence? Would they not, each naturally prefer the present pro-
[334] cedure, or any other form of that mandate of confidence postulated in arbitration?

I cannot withstand the desire to remind you what was said on this subject June 9, 1899, by Mr. BOURGEOIS in the name of the French delegation:

> It is in the same spirit of fundamental prudence and with the same respect for national sentiment that the principle of permanent tenure of office by the judges has not been included in both drafts. It is impossible in fact to avoid recognizing the difficulty in the present political condition of the world of forming a tribunal *in advance* composed of a given number of judges representing the different countries and seated *permanently* to try *case after case*.
>
> This tribunal would in fact give to the parties not *arbitrators*, respectively chosen by themselves with the case in view and invested with a sort of personal warrant of office by an expression of national confidence, but *judges* in the private law sense, previously named without the free choice of the parties. A permanent court, however impartial the members might be, would run the risk of assuming in the eyes of universal public opinion the character of State representatives; the Governments, believing that it was subject to political influence or to currents of opinion, would not become accustomed to come to it as an entirely disinterested court.
>
> Freedom of recourse to the arbitration court and freedom in the choice of arbitrators seems to us, as it did to the authors of these drafts, the essential principle to the success of the cause to which we are unanimous in desiring to render useful services.

This quotation is replete with reason and at the same time with natural eloquence!

We do not know how this tribunal would sit. It would certainly not meet in full membership, that is to say, seventeen, but either seven or nine councilors. If so, would it not be the tendency to exclude in the first place those belonging to the countries in dispute? In that case the idea of arbitration would experience a setback!

And irremovable in principle, it would yet be necessary that these judges might be removable! By whom? Would they be removed by the nation from which they received their mandate and which would thus intervene in judicial matters, or else should they be removed by their colleagues at the risk of some political suspicion? These are all very delicate matters and could not well be judged except by a study of the complete and definitive propositions.

Other objections of the same nature have been laid before us by our learned colleague, Mr. KRIEGE, in connection with the establishment of the prize court, and, permit me to read to you what Mr. MÉRIGNHAC says upon this matter in concluding a long study, in his treaties upon international arbitration, numbers 460, 461, and in his book upon the Hague Conferences, No. 163:

> To the permanent and irremovable magistrates we shall therefore prefer judges appointed for each case, that is to say, jurymen. The jurisdiction alone must be permanent, whilst those exercising it must be chosen in each case, even as arbitrators are appointed to pass judgment upon a distinct dispute.

Mr. MÉRIGNHAC does in no way criticize the appointment of the judges by the sovereign, as some members of our Commission saw fit to do. I am also of the opinion that amongst the acts naturally reserved to the royal power in monarchies, there is none that offers more guarantees, since it is the subject of a universal publicity, and I am not aware that this has met with any objection from anywhere.

Gentlemen, I do not desire further to abuse your attention. I believe I have said enough to justify my preference in the form of the present institution which seems to me to have fully accomplished what could have been expected of it.

It is the *compromis* clause the practice of which the Institute of International Law had, since 1877, recommended to the States, and to whose importance even before 1877 Mancini had called attention. And its intro-
[335] duction into the law of nations has greatly contributed to incorporating therein the notion of justice which has at last passed into the field of positive verity.

Thence, no doubt, those numerous special arbitration treaties that have been concluded since 1899—their number has been stated as thirty-three; this is a result which in and by itself permits the survivors of the First Conference to bestow respectful memory upon its work.

May the future, may our aspirations, equally sincere, may our common efforts ensure new progress. In the field of facts so much must still be done! (*Prolonged applause.*)

His Excellency Mr. **Gonzalo Esteva**, first delegate of Mexico: The Mexican delegation, in thanking the honorable delegation of the United States of America for the declaration that his Excellency Mr. CHOATE has just made, must lay before the Commission the reservations under which it will vote the proposition under discussion.

The instructions of our Government, his Excellency Mr. ESTEVA states, are, in accord with our personal sentiments, to vote in favor of this proposition, which will increase the prestige of the Hague Arbitral Tribunal, which will facilitate access thereto, and which will simplify arbitral procedure, while at the same time leaving the States free to act upon a special jurisdiction.

But the principles that will serve as a basis for the constitution of the Permanent Court are of so great importance that the Mexican delegation reserves its definitive vote until a time when it shall have acquainted itself with the various projects that shall be proposed for the constitution of the court.

His Excellency Mr. **Milovan Milovanovitch** does not intend to enter for the present into a thorough-going discussion of the American proposition, but he desires to present the following declaration in order to explain his abstention from voting upon the principle.

The Serbian delegation, while supposing that the institution of the Permanent Arbitration Court will in no way derogate from the principle of the freedom of choice of the judges for the interested States, subordinates its adhesions to the proposition of the delegation of the United States of America,[1] upon the following conditions:

1. That it be preliminarily established by a general provision that arbitration is obligatory for a class of international disputes justifying quantitatively and qualitatively by reason of the number as well as the intrinsic importance of the cases to be decided, the creation of such an organ of international jurisdiction:

2. That, as regards the composition of this permanent court, one should take as the determining principle either the absolute equality of the rights of all the States, or else abstraction being made of States and nationality, the personal qualities of the judges from the point of view of their competence and of the guarantees of their international impartiality.

While waiting for information with regard to these two subjects the Serbian delegation reserves its judgment and abstains from voting.

Mr. **Belisario Porras**, delegate of Panama: I arise at this time vigorously to support the American proposition concerning the establishment of a permanent court at The Hague.

As was declared by our distinguished colleague, Mr. MARTENS, arbitration is the idea that dominates our time even as the idea of the crusades dominated the Middle Ages. I believe that it is to the interests of the small States to have this principle extended as widely as possible.

It is to our interest that there should exist a single system of international law for in its present state international law is derived from certain
[336] fundamental principles and from certain other principles which have been accepted in order to regulate certain relations between the States. From this there inevitably result disputes, and from these disputes the stronger always derives his profit. It is necessary, therefore, to establish a jurisprudence that shall fix the relative value of these different principles.

It is also to our interest that disputes of an international nature be decided by men and not by nations because all of us have more confidence in an honest man than in a Government. Mr. MARTENS has spoken of the respect which certain sovereigns inspire and the moral influence that goes with their arbitral decisions. This is naturally true. We pay homage also to these high personages; but I believe that our distinguished colleague will agree with me when I say that most of these arbitrations are more political than juridical, and, furthermore, they are seldom founded on reason.

In the history of Rome the rules of law were for a long time kept secret.

[1] Annex 76.

They were applied on each occasion by the body entrusted with their preservation. But the people realized that this manner of proceeding did not offer sufficient guarantees for the weak and it called for a text of the laws upon bronze tablets. In our days the principles of law are preserved in the bureaus of the ministries of the great Powers which on each occasion take from their correspondence those dispatches and documents proving them to be in the right, and if such reason is not regarded as very good, there always remains to them brutal force by which they might cause it to be accepted.

Every small State has been made to feel this sorrowful truth, but when there shall be a court, the small State may offer to have its reasons presented before this court, and public opinion will condemn the great State that would do without this impartial examination.

Certain small States are afraid of extending the recourse to arbitration, because, as they say, the great Powers will avail themselves of this arbitration pretext to meddle in the internal affairs of the small States; but we are of the opinion that a court offering guarantees of independence might preliminarily decide whether or not there is an unjustified intervention in the internal affairs of a sovereign State.

On the other hand, the small States think that the great States would refuse to submit important disputes to arbitration and that the small would not possess the means to force them thereto. But we believe that public opinion will greatly influence the Governments. The support that the small States would find in public opinion after an offer of arbitration would be by far more efficacious than an appeal to the chancelleries of the great States as in our day.

Let us, therefore, establish a permanent court of justice, and when the nations will have voluntarily submitted their disputes to this court, the decision rendered will be carried out, because nations and individuals will have confidence in its decision. This court will be so highly placed by the virtue and by the knowledge of those composing it that partisan interests would exercise no influence upon it.

His Excellency Mr. **J. N. Léger**, in the name of the Haitian delegation, develops the following considerations:

The Haitian delegation asks permission to state the reasons of its adhesion, both to the proposition of Russia,[1] and to that of the United States of America,[2] relating to the establishment of a permanent arbitration court.

It is certain that the temporary tribunals to which recourse has been had up to the present time, can give neither the cohesion nor the sequential spirit which are indispensable to the creation of an international jurisprudence. It is a [337] fact that the idea of creating a stable and permanent institution is not at all of modern origin; it had already preoccupied certain minds even in those days when might prevailed over all. You are too well acquainted with the various plans worked out to that effect and with the generous attempts of publicists that it should be necessary for me to recall them to your minds. It will suffice that I say that through the centuries and in spite of many vicissitudes, the idea has been kept alive, and in 1899 it took possession of the First Peace Conference where it began to assume concrete form. But the very timidity with which it was received,

[1] Annex 75.
[2] Annex 76.

the reservations that surrounded the cradle of instruction which claimed its civic right among the civilized nations prove that all distrusts had not yet been disarmed. And the new creation was of necessity a prey to the doubts entertained by many regarding its practical utility. Since then nearly eight years have passed by; and the experience which has been gained, aided by the good-will of everyone has done away with many prejudices; so that to-day it is possible to take another forward step and to consolidate, by perfecting it, an institution that the common conscience of the peoples demands more and more as one of the best guarantees of universal peace and fraternity.

The question indeed interests the great and the small; for the weak it is of even greater importance than it is for the powerful. No one of us can therefore remain indifferent to it. In consequence, the Haitian delegation heartily accepts the principle of the Russian and American propositions. It will view with pleasure the transformation of the members of the future permanent Hague Court into real judges. By no longer leaving them in the pay of their respective States, by securing their indemnification from funds supplied by all the signatories of the Convention, we shall incontestably impart to their high functions the international character which the American proposition contemplates. But, while each, according to its resources, contributes to the expenses that are necessary for the regular functioning of the tribunal, all the nations will be equally interested in the realization that the judges enjoy the highest possible moral authority, that no suspicion of partiality may even touch them. The common desire will be, therefore, to see them placed so high in the esteem and in the opinion of the peoples whose collective mandatories they will be that their work and their decisions will succeed in inspiring absolute confidence and the most profound respect. For as long as their duties shall continue, would it not, to that end, be wise to forbid them to accept either decorations or rewards of whatever nature from any Government other than the one on which they depend? In the ordinary practice it is not admitted that judges are under obligation to those who eventually may have to plead before them or who have appeared at their judicial bar. When applied to the international domain this rule cannot fail to enhance the prestige and the character of the members of the permanent court, as well as to give them a higher idea of their impartiality. We, however, take the liberty of commending it to the attention of the Commission.

While accepting the principle of the American proposition, the Haitian delegation has, nevertheless, wondered if the manner of selecting the judges might not give rise to some inconveniences. Forty-five States have sent delegates to The Hague; the new convention for the settlement of international disputes will probably be accepted by all. Nevertheless, the United States asks that the permanent court be composed of only seventeen judges. How are these seventeen to be elected? No doubt, a number of independent Powers will be asked to constitute themselves into groups, to form a sort of electoral board for the designation of the judge entrusted with representing at The Hague their languages and their special legislations. Will such selection take place without difficulty and will it not lead to dangerous rivalries for the work of peace and concord which it is desired to establish?

[338] In putting this question and leaving it for the authorized voices of the Commission to solve it the Haitian delegation cannot avoid adding that the

procedure indicated in the Russian proposition seems to it more in harmony with the principle of equality so competently stated by the delegation of the United States. Even as under the authority of the Convention of 1899, there is at present nothing that may prevent our authorizing all the signatories of the new diplomatic instrument to designate each a certain number of judges intended to compose the list of the eventual members of the court. Once they have met in general assembly, those of the judges delegated to that end by their respective countries, would be expected to designate their colleagues destined to constitute a permanent court. The members thus elected would themselves choose their successors and would be divided into series with mandates of unequal duration in order to prevent the integral renewal of the personnel of the court. By not replacing them all at one and the same time, traditional practice would be insured and this would make it possible to secure an international jurisprudence in view of the fact that the decisions rendered would be published in a collection edited under the control of the International Bureau.

The creation of a permanent arbitration court gives rise to another class of ideas that we think it will be useful to refer to now. Ordinary tribunals interpret, they apply laws or customs accepted as law. Everywhere the attempt has been made to codify the rules generally accepted and give to each as sure a guide as possible. Between the nations have been established, in the course of the centuries, practices that are more or less scrupulously observed, and thus we have come to have an international public law which has its principal source in the customs and treaties. But it has been asked, wrongfully of course, if there exists such an international public law; and it has been answered by saying that, besides sanction, it lacks a legislator for the formulation of the rules, and a judge whose mission it is to apply them. In establishing the permanent court the Second Peace Conference will have created the judge and filled one of the gaps which made it possible for some well-minded persons to doubt the existence of a truly international public law. But, would it not be possible to go a little further and find a legislator as well? May not the States that are going to reach an understanding with regard to supplying a tribunal for the whole world, agree to give legal force to those practices which seem most frequent in international relations?

On the other hand, the improved system of communication makes contact between peoples more intimate than formerly; isolation is now the exception and the nations, as it were, mutually interpenetrate. The causes of conflicts between their respective private laws become consequently more numerous; thence the necessity of seeking in a series of special agreements a means for generalizing a certain number of rules.

In these circumstances, why should we not make the attempt to codify public international law and private international law? Is it impossible to separate from all the practices accepted by the nations or endorsed by treaties a certain number of rules intended to guide international relations? This codification seems to be one of the necessary consequences of the establishment of a permanent arbitration court accessible to all independent States. There certainly would be no inconvenience in entrusting the members of this high tribunal with the task of preparing it or supervising its preparation. Their work would then be submitted to the study of the Third Peace Conference. And in the more or less distant

future the international law voted by the representatives of all the Powers of the world will have become a reality.[1]

Mr. **José Gil Fortoul,** delegate of Venezuela: The Venezuelan delegation adheres to the project for the constitution of a Permanent Arbitration Court [339] presented by the delegation of the United States of America.[2] At our last sitting, we applauded the captivating eloquence of the distinguished American jurists when developing one of the most fecund ideas of the Second Peace Conference. We intend to enlarge, to complete and make a real world institution of the one that was but outlined in 1899;—we mean to make it a world institution by stipulating in accordance with the American project, that the judges of the Court "will be chosen from the various countries so that the different systems of law and procedure and the principal languages" will be represented in it. The present Court has until now lacked these conditions, and it is perhaps for that reason, that, as was stated so very competently by his Excellency, Mr. MARTENS, the number of cases submitted to its decision has been so small.

What would be the most equitable basis on which to determine the nationality of the judges of the new Court? With regard to this matter the Venezuelan delegation asks permission to present a simple suggestion. Both the report of Mr. SCOTT, in so far as it deals with the matter of population, and the declaration of the Argentine Republic concerning foreign commerce, seem to lose sight of the fact that the interests of the States, great and small, cannot be measured by this sort of actual facts whose relative importance might change within the more or less near future. All the Powers of the civilized world, with very few exceptions, having adhered to the Convention of 1899, the Peace Conference has become a world assembly and its task consists of laying down principles that can be universally accepted and of creating an institution that will guarantee, on the basis of an absolute equality, those interests that each State deems essential to its sovereignty.

To-day it would undoubtedly be impossible to constitute the Permanent Court with a representative of each State, but it seems that we might take into account a circumstance which, within a certain measure and from the point of view of international law, determines the present phase of the world. This circumstance is more geographical than statistical. Europe, America and Asia still form groups of Powers which upon capital questions have interests or aspirations or tendencies all their own, in spite of that fecund principle of world solidarity which our distinguished President champions with such great faith and with such generous eloquence. While awaiting the realization of this noble ideal we might perhaps seek in the idea that I have the honor of submitting to your consideration, a more practical basis for determining the proportion of the personnel of the contemplated court.

In short, our suggestion is as follows:

The Permanent Arbitration Court will be composed of a certain number of judges possessing the qualities specified in the project of the United States of America, belonging in equal number to the European, American and Asiatic continents, and representing, so far as possible, the most widely diverse languages of the various nationalities.

[1] See annex 78.
[2] Annex 76.

Mr. President, the question is so important and so many details will have to be studied, that the Venezuelan delegation has hesitated to formulate a proposition or a special amendment. It merely desires to call to the attention of the subcommission, and, if necessary, the committee of examination, the essential point of this great question.

His Excellency Mr. **Ruy Barbosa:** I begin by expressing our most decided adhesion to the terms of the Mexican proposition, the contents of which, regarding the absolute freedom of the nations in the matter of their choice of arbitrators, has this day and this very hour surprised us. To the same purpose we had already presented a formal declaration at the sitting of July 23, and it is for the purpose of supporting it that I now ask for the floor.

[340] For the adoption and for the future of international law we regard as singularly grave the innovation of the obligatory court, which, by an unforeseen evolution, seems to graft itself, in some minds, upon the obligation of an arbitral decision.

These are two distinct questions that we must absolutely keep separate. One may admit obligatory arbitration for all the international disputes and not bind oneself for any dispute to the obligation of a court. On the contrary, one might submit to the obligation of the court, and restrict that of arbitration to a small number of cases.

In stating further an elementary idea upon which there has never been any controversy in arbitration matters Mr. Léon Bourgeois, in his inaugural address, recalled to our minds that the right to choose one's judges is the very essence of arbitration. Is this right satisfied when one circumscribes it absolutely to the right of choosing one's judges from a body of arbitrators constituted in advance by the nations that would eventually have to have recourse to it?

This is the idea that has, it would seem, insinuated itself, if perchance there is no error in the phraseology, into some projects submitted to our examination and in which it is preemptorily stated that the disputes which are not settled by diplomacy, "shall be submitted to the Permanent Arbitration Court established at The Hague." It is a fortunate fact that this system which is restrictive of the freedom to choose the arbitrators, has not been adopted by other propositions, such, for instance, as the Swedish and Portuguese propositions, by the terms of which the Powers would merely obligate themselves to have recourse to arbitration. The importance, to our mind very significant, of this dissension, has, in the Brazilian proposition, prompted the formal mention of the right, for the contracting parties, to prefer other arbitrators to those of The Hague.

Heretofore, when reference was made to the means for the pacific settlement of international disputes, we thought of no other obligatory bond than that of arbitration itself. But now it is desired to incarnate arbitration in a single court by depriving the interested parties of the right to choose other arbitrators. It is quite evident that we are here dealing with two very different solutions of which the second does not seem to us deserving of commendation, the more so because, while in appearance it seems to extend the principle of arbitration, it would but restrict it, and, while proposing to propagate it, it would but end in making it less attractive.

We harbor no prejudice whatever against a permanent court. On the contrary, we behold in it a progressive and very beneficial institution. We are sure that a time will come when men will no more think of settling misunderstandings

between nations in dispute except by this tribunal, provided it is given a good organization. But we are also persuaded that we cannot rely upon this invariability of international judicature except as the result of voluntary consent of all the countries in the various successive emergencies; and in the very interest of this progress which would not be durable except as it is voluntarily and freely established, it seems to us that we cannot substitute in the place of the spontaneous confidence of the States a submission stipulated as a perpetual engagement.

It is not merely a matter of interest. It is, in the first place, a question of principle. The States may permanently engage themselves to settle certain disputes only by means of arbitration. They may establish an arbitration for each case by promising to submit to the arbitrators upon whom they may agree. But they cannot in advance and for ever submit to an exclusive and perpetual magistracy without alienating certain essential elements of the national sovereignty. It seems to us that our constitutional system does not confer upon the ordinary agencies of our Government the right of perpetually subjecting the nation, for matters concerning its relations with other States, to an obligatory court.

[341] It is impossible to organize the judicial settlement of disputes between the States in the same manner as for the disputes between individuals. The latter are always the subjects of a sovereignty which decrees the law for them and which they are held to obey, by obeying the judges who ensure its observance. From this forced subjection which leaves no choice to individual wills results, within the territory of each people, the constituted justice whose jurisdiction cannot be evaded. But this is not arbitration: this is obedience dictated by a sovereignty to its nationals.

By transporting it, therefore, into an international sphere it would not be arbitration that would be thus established. Quite a different thing it is. One would create obligatory judicature among the sovereign States even as it exists among the subjects of one and the same sovereignty. Now, as it is for the organization of arbitration that we have been brought together, it would become clear that we have organized quite beyond the scope of our program an entirely different institution; the permanent subjection of the States to an international sovereign court.

As regards the *régime* of international justice, we would in this way go much further than is done with regard to the constitution of national jurisdiction. The action of civil tribunals does, indeed, cease from the moment when the parties agree to have recourse to arbitration, and they are therefore sovereign in the election of the depositories of this conventional justice. In consequence, when all is said and done, it is the individuals themselves who choose their judges, for in the end there is always left to them the option of preferring to the constituted tribunals the arbitrators whom they will freely choose. You would be despoiling independent nations of this right. They would have but the Hague Court to go to without any alternative.

Nor would we grant to them even this option which no one has ever dreamt of refusing to individuals, in spite of their status as subjects. So that in the end, and although they are subjects, individuals would find that they are more master of themselves than are the nations which are sovereign entities.

Now, if from considerations of right and necessity we descend to those of

utility and practical wisdom, one could encounter no better bases for this solution which is, juridically speaking, illegitimate.

Disputes of the gravest sort between contemporaneous nations have been solved by means of the arbitration of chiefs of State, freely chosen by the interested parties. Is there any reason whatever to condemn that kind of arbitration? No. May I ask if arbitrations constituted in any other manner, even as those of the Hague Court, are superior to those exercised by sovereigns or by presidents of republics? On the contrary, the latter, be they presidents or monarchs, have even better and surer means of informing themselves. They have at their disposal councilors of the highest order; they may hear them at any time; they may rely upon the zeal and the solidity of their advice, whilst the other kind of arbitrators usually seclude themselves and narrow their horizon in their personal views and lights although no one could state conclusively that they, at all times, offer the same conditions of independence. Moreover, if the dispute concerns political interests of great importance, it seems always better to entrust the arbitral mission to the experience and to the equity of a Government well thought of by both parties, because such an arbitrator will understand and more discreetly weigh this sort of interests.

Then, if experience controls the nations, the latter may not even find conclusive reasons in it for subscribing to this infallibility of the sole court in international arbitration, without which we do not see why one should refuse to the States the right to substitute other arbitral judges for it.

[342] Do you want any proofs? You know of them better than I do myself. For some ten years there have been a goodly number of arbitral decisions, rendered, moreover, by emeritus jurists or by a body of jurists who have not convinced public opinion of their wisdom, and have cooperated only in a very doubtful way for the authority of the institution.

We will pass by this matter because we do not desire to embitter the minds in the examination of a question that is so impersonal. I shall confine myself to a mere outline of the facts by recalling the affair of the Costa Rica Packet in 1897, that of the boundaries between British Guiana and Venezuela in 1899, and that pertaining to the Venezuelan dispute in 1904. In these three controversies the decisions have been vigorously criticized in international law reviews and elsewhere by the most distinguished authorities in this field, while the second of these affairs, which seriously involved the integrity of the territory of my country, has led to an energetic protest on the part of its Government.[1]

You realize now that I am not expressing my personal opinion. I do not give you my judgment at all with regard to the value of these criticisms. I confine myself to recalling the facts and to reminding you of the attitude of the authorities or of the Governments. Now, these solemn testimonies which, moreover, I abstain from either adopting or rejecting, do not prove that the unique court is not subject to making mistakes nor that a less controverted decision might have

[1] REGELSPERGER: "L'affaire du Costa Rica Packet" in *Revue générale de droit international republic*, 1897, pp. 735-745; JULES VALÉRY: *Courtes observations sur la sentence arbitrale dans l'affaire du Costa Rica Packet; Report of the Brazilian Ministry of Foreign Relations*, 1900, Annex No. 1, Doc. No. 63, pp. 148-153; *Le Brésil*, Paris, No. 708, of August 8, 1899, pp. 4-5; Conference of Mr. RENAULT, before the Society of Friends of the University of Paris, Report published by *Le Temps* of March 26, 1904, under the title "Une critique du jugement du tribunal arbitral de La Haye."

There are still other articles of critical purport, that have been published, especially in the United States.

been secured by other arbitrators. The Hague Court has but four judgments to its credit; these have been lavishly referred to in this discussion and yet, if the criticism of the authorities in the matter is not bereft of wisdom, one of these judgments at least should not be put to the credit of the Court. On the other hand, in other arbitrations, and especially in arbitration cases by chiefs of State, memorable decisions have settled between nations in dispute a large number of questions so difficult and serious as to lead to the most terrible wars. Why, then, should we not have the privilege of preferring to the new arbitration system, which is not yet matured, the system which, on the score of its old and numerous accomplishments, deserves so well of the friends of peace?

I hope that this new court will some day become the areopagus of the peoples, hailed by the confidence of all. But to that end we cannot replace the work of time by that of constraint. It will be vain to think of imposing confidence. Confidence is not secured by decree. Confidence cannot be stipulated. It rises of itself under the influence of natural causes even as the facts of organic evolution.

It is desired to secure permanency in the recourse to arbitration. But permanency would consist in the obligation to have recourse to arbitration, and not in the exclusive submission to a permanent court.

It is said that it is important to impress the public opinion of the world with a striking act. As for myself, I believe that it is not necessary to impress, it is not necessary to astound: but it would be necessary to persuade and convince. Still, in admitting that it is desired to create an impression, can we conceive of a more striking act, of a more ample and serious impression, than that of creating the obligation of arbitration between the nations, and of widening its scope with the greatest possible number of cases hitherto regarded as admissible?

We are told that public opinion is watching us. But what is it that public opinion demands of us while watching us? Can it be the subjection of
[343] all the States to the unique court? No; it is merely their submission to an obligation of arbitration, no matter what court may exercise it. We believe in arbitration. It is the view that among us dominates. It is our point of honor towards the world which is ready to pass judgment upon us. But, if this is our preoccupation, and if such shall be the stamp of the Conference, why should we oppose to those meeting us halfway in accepting arbitration a clause which is foreign to the essence of arbitration, and which would make its adoption difficult?

Fortunately Mr. CHOATE, in his address in the last meeting, has dispelled in this respect the possible misunderstanding with regard to Article 1 of the American proposition of which we now have an authentic interpretation. In the minds of the delegation of the United States, the optional character of the Court would not be changed; the obligation to arbitrate would alone be established by reserving to the States the free choice of the arbitrators. And it is this that the distinguished Mr. CHOATE has this day repeated in adopting the Mexican proposition.

But there seem to be contrary tendencies. There is a something, it seems to us—and we hope we are mistaken,—in the proposition according to which neither the chiefs of State, nor the officials, nor scientific corporations could accept the functions of arbitrators until after the previous declaration of the

parties interested: that they have been unable to reach an agreement with regard to the matter of having recourse to the Hague Court.

This is a limitation, quite arbitrary, to the freedom of the States in the choice of their arbitrators. We can, therefore, not subscribe to it; because in our judgment this freedom cannot tolerate limitations. We must not interfere with it either directly or indirectly. In the first place because it is, of course, inalienable. In the next place, because it is useful. For from the coexistence of different arbitration courts there results for all of them, and especially for the permanent court, a better sense of responsibility because of the fear of comparison with the rest, and in consequence an efficacious stimulant to the attainment of superiority by means of an irreproachable conduct.

On the other hand, if the refusal to submit to the permanent court is absolutely a matter between the parties interested, and depends on them only, is it not quite clear that the fact alone of proposing other arbitrators presupposes, includes and expresses, on the part of those who do so, the mutual resolution of not accepting the Hague arbitration? Why do not they come to this court, a court that is ready and open to all, unless it is because they have agreed to refuse it? Therefore in practice this idea is useless, but in principle it is dangerous, because it pretends to restrict a sovereign and essential liberty which will tolerate no restrictions.

We regret indeed this divergence, which, fortunately for us, remains on the surface of things. At bottom we are all of us equally devoted to arbitration. By means of arbitration Brazil has likewise terminated all matters which she was unable to settle pacifically by other means less free and conciliatory. I shall not give any list of them because every one is well acquainted with the facts, and as time presses, I have to conclude.

But, whatever our devotion to the great aspirations of human welfare and modern progress, we do not forget that in the established usages there are found great instruments for improvement and pacification as useful as those imagined in our days, and that in certain prerogatives of the independence of the States there are found beneficent forces in the interest of the equality between the great and the small, between the strong and the weak, and to depart from which would be unpardonable. When, in the organization of human affairs, we mean to introduce in the world, the reign of the ideal, we must be on our guard against mistakes. Sometimes, in our haste to lay hold upon that which seems ideal, we take hold of it in the wrong way.

[344] The best inventions may prove a misfortune to those who have conceived them in the best intentions. This Permanent Arbitration Court is worthy of our enthusiasm. But it is human: We must preserve it from degeneracy, the principle of which is present at the very birth of everything that issues from our labors. An absolute and exclusive authority is always on the verge of becoming corrupt. Even the judicial form would not exempt it from this danger. We must always set a brake and counterweights, though they be only of a moral nature and indirect, to that which reigns supreme, even in the realm of law. Now then, just imagine for a moment the unheard-of situation of a universal and absolute court enthroned among the peoples in the nature of a universal oracle of justice. Would not this institution which is of an almost superhuman majesty, be more exposed, than any other, to the dangers and to the mistakes of our weaknesses?

It would, therefore, be to its own interest that it should not be alone in the

immense sphere of this judicature, but that there should be, by the side of it, special courts, voluntarily constituted by the choice of the parties themselves.

Think, in the first place, of the position of the judges of this court who would exercise an authority without its like among the powers of the earth. These judges are men. They will feel the influence of their national origin. In assuming their functions, they would still be unable to be oblivious of their native country. Whatever the method resorted to for their election they would always, as a body, represent the strongest nationalities. In this connection, bear in mind all future consequences that would result in case we should exclude the possibility of other tribunals from the international judicature, by leaving to the latter alone the mission of determining that which is right. Would we not subsequently expose ourselves to the frightful danger of having the powerful subtly become the arbitrators without appeal of the right of the weak?

This could in no way be beneficial to the small States, nor to the cause of justice, nor, in consequence, to general good order and to the welfare of mankind. Therefore, in adopting the obligation of arbitration, we must clearly refuse the exclusivism of the court.

Furthermore, it would be necessary to retain the arbitral *compromis,* even in those cases of arbitration before the permanent court, in view of the fact that, with regard to sovereign nations, the authority of any foreign court whatever, cannot be brought into existence, except by means of a special act and by the voluntary consent of the parties on the occasion of each litigation. (*Applause.*)

Mr. **Ivan Karandjouloff,** delegate of Bulgaria, delivers the following discourse in English:

I ask to be permitted to take part in the discussion in regard to the question that is before us; I appeal to the kindly patience of all the members of the assembly who speak English, and I ask pardon of the rest for the liberty I am taking in expressing myself in this language hoping that I may, nevertheless, make myself understood by a large number—perhaps even of the majority of this honorable assembly.

In the name of the Bulgarian delegation I desire to thank the honorable delegations of the United States of America and of Russia for having taken the initiative in two questions of the highest importance—obligatory arbitration and the institution of a permanent court—all the more so because I myself intended respectfully to call the attention of the Conference to these matters. But as these matters come from two great nations, the delegates of Bulgaria have welcomed these propositions with sympathy, believing that, sooner or later, their results will lead to a universal recognition of the utility of an international jurisdiction for all international disputes, no matter what may be their nature and their causes.

[345] For it is an international jurisdiction and not the present armed peace which could prevent wars; and, since the jurisdiction of the common law may settle disputes between individuals, why should not the international jurisdiction be able to settle disputes between nations?

In the beginning of her renaissance, our country, although still a young nation, began already to feel the heavy burden of the enormous expenses necessary for the maintenance of her army, and, in consequence, we ardently desire the advent of an era of equity and of justice between the nations. For it is not by the force of arms that our country endeavors to reconquer her place among

the civilized nations. Our population is neither by nature nor by character warlike; our people are peaceful, hardworking and devoted to science and justice. Hence, the value of each Government in Bulgaria is judged in proportion to the efforts which it makes for the development of its schools and its courts.

The progress made from this point of view, especially as regards the development of the courts of justice, has already been recognized by the great European Powers which, through the successive treaties concluded with our Government, have recently renounced the major part of the privileges known as *capitulations*, secured in past times either through treaties or by usage in favor of the European residents in the countries of the Orient.

Thus rewarded by that love of impartiality and justice, my country naturally hopes to be treated with the same impartiality, beyond her boundaries, and in consequence desires to have a recourse open to her before an international obligatory jurisdiction for all the nations—small and great—and be able to count, in case of necessity, upon judges whose irremovableness, together with the other requisite qualities, would be a guarantee of their independence and of their impartiality.

But, although the Bulgarian delegation accepts the principle of the permanency of the arbitration court, I shall permit myself, in its name, to submit to the committee of examination some amendments [1] to the proposition of the delegation of the United States of America, upon some secondary matters; in the first place, upon the system according to which the judges shall be designated, and in the next place with regard to their rights and duties, to wit:

1. The fundamental principle of the Convention of 1899, concerning the designation of judges (Article 23), should be preserved in the new organization of the permanent arbitration court. Each of the contracting States must have the right to designate at least one person of recognized competence in matters of international law and enjoying the highest moral consideration. The persons thus designated by all the signatory Powers shall choose from amongst themselves the judges to the number required for the composition of the permanent court. In this way the principle of the Convention of 1899 will be safeguarded. It is, therefore, in this sense that Article 1 of the project of the United States of America should be expressed;

2. Article 3 of the same project lays down the rule according to which a judge must not take part (as judge) in the affairs in which his own country is involved. In such case the partiality of the judge is therefore presumed. It seems to me that, on the contrary, the impartiality of the judge should be presumed, even in those matters in which his own State is involved, but he might, as judge, be rejected by the parties interested. On the other hand, he must have the right to withdraw himself from a case when he realizes that, for one reason or another, his participation therein might shake the confidence due to the judicial authority. Therefore, Article 3 of the project should be so worded as to meet this point.

His Excellency Sir **Edward Fry:** It is with great pleasure that all of us have listened to the eloquent discourse of the first delegate of Belgium.

[346] If it were a question of supplanting the present Permanent Court by a new court to be created, I should without hesitancy, side with Mr. BEERNAERT, but according to the American scheme, that is not the question.

[1] Annex 77.

This scheme proposes to create a new court in addition to the present court. The two courts will work together toward the same goal and the one which appears to answer the needs of the nations best will survive. The choice will be free to the nations, and it is very certain that the most effective court will be chosen.

His Excellency the Marquis **de Soveral**: I requested the floor in order to justify with an abundance of reasons the vote of the Portuguese delegation on the project of a permanent arbitration tribunal presented by the delegates of the United States of America.[1]

But the eloquent discourses that have been delivered in the course of this meeting, have exhausted the matter, and I do not know what to do with the four sheets of points that I brought here with me.

Nevertheless, you will permit me to point to a matter which seems to me to constitute an injustice against the project that I cherish for a general obligatory arbitration treaty. It has seemed to me that my friend, Mr. CHOATE, and other speakers who followed him, have stated that the project of an obligatory arbitration court was the first matter before the Conference. But this is not so. Either chronologically, or from the point of view of importance, this project is not the paramount question. The first question is the project of a general obligatory arbitration treaty.

It seems to me impossible to organize a tribunal before we are in position to provide the material basis for it, and to appoint judges before we are able to submit cases to them. This would be an inversion of the natural order of things, and, to my mind, we must not confound the two issues.

The Portuguese delegation gives its adhesion to the principle of the project in discussion, but with the reservations contained in the declaration of the delegate of the United States of Mexico. Moreover, I had no need of this declaration. I saw at once, in the liberal spirit of the proposition presented by the delegates of the United States of America, a recognition of the noble and indisputable principle that the free choice of the judges is the very essence of arbitration.

His Excellency **Samad Khan Momtas-es-Saltaneh**, first delegate of Persia:

The Persian delegation has already expressed itself in favor of any proposition tending to the development of the principle of arbitration. Faithful to the provision contained in Article 16 of the Convention of 1899 regarding the pacific settlement of international disputes, the Imperial Persian Government has, since the First Peace Conference, constantly added an arbitration clause to the treaties concluded by it since 1899 with other Powers, such, for instance, as Brazil, Mexico, Chile, the Argentine Republic and Uruguay.

I am therefore happy to be able to state that the Persian delegation will vote with all the more pleasure the proposition of the United States of America upon the principle of the constitution of a permanent arbitration court, because it regards it as meeting very high sentiments of international justice and concord, and cherish the hope that consideration will be given to the declaration that has just been made by his Excellency the first delegate of Great Britain.

I pay homage to the lofty spirit that has inspired the modifications proposed to the Convention for the pacific settlement of international disputes by the distinguished Professor, Mr. MARTENS, and I hope, in accord with his Excellency, Sir EDWARD FRY, that the committee of examination will in particular adopt the idea that the court will always be accessible.

[1] Annex 76.

[347] The **President** yields the presidency to Mr. DE BEAUFORT.

His Excellency Mr. **Léon Bourgeois** takes the floor in his quality of first delegate of France.

I have listened to the objections that have been formulated by several of our colleagues with so much eloquence and force, against the projects of the peramanent arbitration court submitted by the delegations of the United States [1] and of Russia,[2] and I have noticed their misgivings to which we shall have to give the greatest consideration. It seems possible, however, to reassure them.

I share the sentiments of Sir EDWARD FRY and of Marquis DE SOVERAL; and I declare that if the propositions that we are examining could result in the suppression of the Arbitration Court as it was established at The Hague in 1899, there would not be here an opponent more resolute then myself.

Mr. BEERNAERT has done me the great honor of quoting the words by which I have repeatedly expressed my attachment to the First Conference and defended the system of 1899 and the appointment of the arbitrators by the parties. There is nothing that I care to withdraw from these words. I still think what I then thought concerning the conditions for the general organization of a universal arbitration court, when it is looked at from the whole system of its jurisdiction, and when it is to be made accessible to all cases, even the most serious of international disputes.

But we are now dealing with quite a different question; we must find out whether, for limited purposes and under special conditions, it is not possible to secure the working of arbitration more quickly and easily under a new court in no way incompatible with the first court.

It is in this spirit that the French delegation, which has already submitted two propositions [3] tending to facilitate access to and simplify the procedure of the international Hague jurisdictions, has broadly examined the propositions of the United States and of Russia, and now gives its cordial adhesion to the ideas that have prompted them.

We are, all of us, impelled by the desire to promote the cause of arbitration. But we seem to separate into two groups when we endeavor to find the best means to be used to increase the application of it. Two systems are in presence of each other: the first consists in proclaiming the *obligation* of arbitration of certain cases; the second is based upon the *permanence* of a tribunal strongly organized.

As for ourselves, we believe that it is necessary not to separate these two means.

We admit the force of certain criticisms offered by Mr. ASSER and by Mr. CHOATE against the work of 1899. As Mr. ASSER has stated: "It is necessary that there should be judges at The Hague." If there are not at present any judges at The Hague it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of particular gravity. We should not like to see the Court created in 1899 lose its character as a real court of arbitration entirely, and we intend to preserve this freedom of choice of the judges in all cases where no rule is provided.

In controversies of a political nature, especially, we think that this rule

[1] Annex 76.
[2] Annex 75.
[3] Annexes 1 and 9.

will always be the real rule of arbitration, and that no nation, big or small, will consent to go before a court of arbitration until it takes an active part in the appointment of the members composing it.

But is this the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? And does not everyone realize
[348] that a real court, composed of real justices, may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?

In our opinion, therefore, either the old system of 1899, or the new system of a really permanent tribunal may be preferred, according to the nature of the case. At all events, there is no intention whatever of making the new system compulsory; no one shall be compelled to have recourse rather to the one than to the other. The choice between the Court of 1899 and the tribunal of 1907 will be optional. And, as so well stated by Sir EDWARD FRY, experience will show the advantages or the disadvantages of the second system; usage will sanction the better of the two jurisdictions.

Gentlemen, if we have found it impossible to extend the jurisdiction of a permanent tribunal to all cases of arbitration, we will be equally compelled to recognize the impossibility to extend to all these cases the obligation of arbitration itself no matter under what form this jurisdiction may appear.

To be sure, some States like Italy and Denmark have been able separately to contract general obligatory arbitration treaties, extended unreservedly to all cases, even to political disputes. But, in the present world situation, who can hope to see a universal convention, including even political disputes, secure the signatures of all the nations?

Here again, we are led to make this distinction between political and juridical questions which but a moment ago has enlightened and guided us.

At this moment it has not seemed possible to enact, for political disputes, the obligation by means of a universal treaty. But, on the contrary, is not the obligation to have recourse to arbitration acceptable for all States in the case of disputes of a purely juridical nature for which no one of them would risk a bloody conflict? Within this field it may be hoped to tighten the bonds of arbitration around the nations, and it may be hoped that they will consent to recognize the obligation of it. And when I say obligation, I mean real obligation, without reservations of any kind; for as regards this group of juridical questions, I agree with Baron MARSCHALL by rejecting the so-called case of "the honor and the vital interests." All jurists will agree in believing that these words introduce into the conventions a "potestative condition" which deprives them of every shred of juridical necessity and makes the engagement of no value whatever. In those cases where obligation is possible, it must be made a reality.

Thus, gentlemen, we see before us as two distinct domains, that of permanency and that of obligation. However, we reach the same conclusions in both domains.

In the domain of universal arbitration there is a zone of possible obligation and a zone of necessary option. There are a vast number of political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration.

Likewise in the domain of permanency, there are cases whose nature is such as to permit and perhaps warrant their submission to a permanent tribunal.

That is to say, there are matters for which a permanent tribunal is possible—but there are others for which the system of 1899 remains necessary, for it alone can give the nations the confidence and security without which they will not go before arbitrators.

Now, it is found that the cases in which the permanent court is possible are *the same* as those in which obligatory arbitration is acceptable: they are, [349] generally speaking, cases of a legal nature, whilst political matters in which the nations should be allowed freedom to resort to arbitration, are the very ones in which arbitrators are necessary rather than judges, that is, arbitrators chosen at the time the controversy arises. Do not we now see by a sufficient analysis the exact conditions of the problem? And is it not the very nature of things that is to afford us that solution?

Gentlemen, is it possible for us to come to an agreement by which we are to impart life to that problem?

While maintaining intact that great Court of 1899 whose services are already a matter of historical record, can we establish by the side of it—perhaps even within that very Court—a more restricted, really permanent, tribunal and of a more juridical nature for cases purely legal? Is it possible for us to agree in declaring that these purely legal cases are compulsorily submitted to arbitration? Can we thus strengthen and fix in part, so to say, the international institution of arbitration, both as regards its judges and the objects of its jurisdiction?

We hope so, and will gladly welcome the day when, by the side of the Court of 1899, or, better yet, within its own circle and perhaps even through the Court itself, there may be established a permanent tribunal for matters of a legal nature, in such conditions that the smallest even as the largest States will find in it equal guarantees for the determination and the security of their rights.

It has been justly said that in the other commissions of the Conference the members have been busy, especially with matters concerning the régime of warfare. Even in our First Commission, the subcommission which, upon the initiative of our colleagues from Germany and England is working out the very interesting project of the prize court, deals really with the jurisdiction operating in time of war. But here in our first subcommission we may only seek to decrease the dangers of war, and to *strengthen peace.*

We have recognized that there are at present two practical means for realizing that end, and we have said that in our judgment, these two means are inseparable; on the one hand the determination of a certain number of cases of *real obligation* of arbitration and on the other hand the establishment of a *really permanent* jurisdiction.

We shall work with all our strength in view of that twofold result.

The world desires peace.

For centuries it clung solely to the motto: "If you desire peace, prepare for war," that is to say, it confined itself to the *military organization of peace.* We are no longer at that stage of progress, but we must not be content with promoting the more humane organization, the *pacific organization of war.*

The discussions which have taken place here have shown us the progress of education in this respect, the sentiment, new and each day more urgent, of the solidarity of men and nations in the struggle with the fatalities of nature. We have confidence in the growing activity of these great moral forces, and we hope the Conference of 1907 will take a decisive step beyond the work undertaken in

1899 by insuring practically and really the *juridical organization of peace*. (*Prolonged applause.*)

His Excellency Mr. **Beldiman** takes the floor: I do not intend to object to referring the proposition of the United States of America to the committee of examination. But, as we are about to express our opinions on the very important institution of a Permanent Arbitration Court, I take the liberty of present-
[350] ing a previous question which Mr. SCOTT himself in his remarkable report has qualified with the word *capital* for the realization of the project submitted to our deliberations: the question is how the sixteen or seventeen judges designated to compose the permanent court in conformity with the proposition of the United States, shall be appointed to their high functions. Mr. SCOTT has told us that it would be necessary to take the population as an essential factor of this international court and that it would be necessary formally to state what figure of population should furnish the unit of representation. While insisting upon this principle, the delegate of the United States has, however, not given us any indications, not even general in their nature, upon the manner in which he meant to put it into practice. As this point is justly considered as *capital* by the authors themselves of the project, I believe that we are entitled to ask our colleagues from the United States to be good enough to communicate to us, if not the details of their project the study of which is reserved for the committee of examination, at least the general formula, as they intend to propose it. It seems to me almost impossible to express ourselves intelligently with regard to the institution to be created, an institution of such great importance, and of which one of the essential and decisive elements is so indefinite.

While waiting to be enlightened with regard to this matter I take the liberty of announcing a motion concerning the American proposition in case it should be adopted.

Mr. CHOATE declared that his project in no way tended to change the optional character of the court now established. No State could be forced to go before the new permanent court which would be made accessible to all those desiring to settle their disputes by pacific means. Thus, any signatory Power desiring to do so, might always choose its own arbitrators and the constitutional and arbitral tribunal in conformity with the Convention of 1899 at present in force.

We believe it indispensable that this principle, announced by the first delegate of the United States, should be the object of a special article to be included in the eventual stipulations relative to the new permanent arbitration court.[1]

His Excellency Mr. **Juan P. Castro** states that the Uruguayan delegation accepts the principle of the proposition of the United States, but reserves the right to examine and find out if the organization of the permanent court will offer all the guarantees that may be expected from it.

His Excellency **Réchid Bey** declares that the Ottoman delegation has not yet received any instructions and reserves to itself to state its opinion subsequently.

The **President** calls for a vote to ascertain if the principle of the United States of America shall now be considered.

[1] Annex 79.

His Excellency Mr. **Beldiman** declares that not having received any answer from the American delegation to the question that he had put, he will abstain from voting.

Consideration of the proposition of the United States of America regarding the establishment of a permanent arbitration court [1] is voted by twenty-eight votes with twelve abstentions.

Voting for: Germany, United States of America, Argentine Republic, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, France, Great Britain, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Panama, Paraguay, the Netherlands, Peru, Persia, Portugal, Russia, Salvador, Uruguay, Venezuela.

Abstaining: Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Serbia, Siam, Sweden, Switzerland, Turkey.

[351] This proposition together with that of the Russian delegation on the same object are referred to the committee of examination.[2]

The **President**: Several of our colleagues have expressed the desire to have propositions concerning a permanent court studied by a special, very small committee of examination. I believe, gentlemen, that it is proper to have this committee remain in close contact with the original committee which has already been entrusted with the task of working out a plan for obligatory arbitration. The two matters are so closely allied that they require to be worked out in common.

I have the honor, therefore, of proposing the following combination:

The committee of examination has been composed by two successive operations, the second of which completed the first: it is therefore constituted as follows: to the members elected in the very beginning we have added, for the study of the matters relating to obligatory arbitration, seven new colleagues. These form, as it were, a special subcommission within the committee of examination: **the committee on obligatory arbitration.**

I propose, gentlemen, that you appoint this day a new special subcommittee which we shall call, if agreeable to you, the subcommittee B, which with the members of the initial committee of examination will study the questions relative to the permanent court.

This twofold organization will permit the committee to study more rapidly the questions submitted to it. (*Approval.*)

The following names are then proposed by the PRESIDENT and accepted by the subcommission: his Excellency Mr. CHOATE, his Excellency BARON MARSCHALL VON BIEBERSTEIN, his Excellency Mr. EYSCHEN, Mr. LOUIS RENAULT, his Excellency Mr. BELDIMAN, his Excellency Mr. CARLOS G. CANDAMO.

The PRESIDENT proposes to postpone the next meeting until Thursday and suggests as the program for the day the discussions of Articles 21 and following of the Convention of 1899.

The meeting closes at 5 o'clock.

[1] Annex 76.
[2] Annexes 75 and 76.

ELEVENTH MEETING

AUGUST 13, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the tenth meeting are adopted.

The **President** opens the discussion regarding Articles 21 and following of the Convention of 1899 for the pacific settlement of international disputes and the amendments proposed thereto.

He reads aloud Article 21.

ARTICLE 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

No proposition has been submitted with regard to this article and no remark is offered in relation thereto.

The Commission passes on to Article 22.

ARTICLE 22

An International Bureau, established at The Hague, serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court. It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by a special tribunal.

Mr. Kriege speaks as follows:

The amendments proposed by the German delegation [1] and which in the synoptical table are printed opposite Articles 22, 24, 37, 38, 39, 40, 49,
[353] 51 and 57 of the Convention of 1899 are of only secondary importance.

The most of them are prompted by the wishes that have been expressed by the arbitrators in what has been called the case of the Pious Fund of California and in the Venezuelan Affair. In presenting them, we have had no other object than that of preparing the work of the committee of examination.

The same does not apply with regard to the three articles that we propose to insert after Article 31 and after Article 34 of the Convention. This project relates to a matter which, in our opinion, is particularly interesting. It aims at facilitating recourse to arbitration with regard to disputes for which a general arbitration treaty exists between two Powers. At the same time it tends to strengthen this character of juridical necessity which is essential to obligatory arbitration.

[1] Annex 12.

Cases may arise when the two parties may think that a dispute that has arisen between them comes within the arbitration treaty, and that there is in consequence need of submitting it to the decision of an arbitral tribunal where, however, they may have difficulties in regard to agreeing upon the determination of the object of the dispute and upon the extent of the powers of the arbitrators. The negotiations may be prolonged without leading to any settlement. To obviate such a failure, it is desirable to put at the disposal of the parties a practical means of overcoming the difficulties.

We have thought that, for the questions under consideration, the task of establishing the *compromis* might well be entrusted to the permanent arbitration court. Each of the parties would have the right to call for its assistance which the adverse party would be bound to accept. The matter would then be settled by a commission composed of five members of the court, two of whom are appointed by the parties, and the other three by Powers not interested in the dispute. The project contains rules intended to do away with any procrastination in the composition of the committee and to insure its impartiality. Its next object is that in cases for which the *compromis* has been established in this manner, the three members of the commission appointed by the non-interested Powers will also be expected to form the arbitration tribunal, a fact that might perhaps be useful in view of their acquaintance with the facts gained in the course of their labors for the establishment of the *compromis*.

The proposition has been worked out before the submission of the convention project concerning the establishment of an international court of justice. Now, like the proposition of the German delegation and with certain modifications, it has been incorporated in this project which has just been presented to committee B of our subcommission. We believe, therefore, that it will pertain in the first place, to the committee to deal with the important problem that I have just indicated.

Upon a remark by Mr. **Louis Renault,** the **President** states that the German propositions dealing with procedure might, if necessary, apply as well to the court which it is proposed to create as to that which was established in 1899.

The German propositions are referred to the committee of examination to be examined later on, when the establishment of the new court shall have been more thoroughly studied.

His Excellency Mr. **Martens** presents the reasons that prompted the two Russian propositions inserted in the table under Articles 22 and 23.[1]

These propositions are based upon the experience gained from arbitrations that have taken place at The Hague.

Upon their arrival, the arbitrators found that nothing had been prepared with regard to the material organization of the court, which can be explained in part by the lack of sufficient means placed at their disposal.

[354] At the time of the Venezuelan arbitration, the arbitrators sent to the Netherland ministry of foreign affairs a letter containing certain *desiderata* which the delegation made the object of its propositions. The necessity had indeed to be a very real one to establish the reasons for this letter. We must not be afraid to say so, for the fact is that the tribunal had not a cent at its disposal wherewith to purchase the necessary paper.

As to the addition which it is proposed to make to Article 23, his Excellency

[1] Annex 10 .

Mr. MARTENS reminds the Commission that the question as to whether the members of the Permanent Court have the right to plead before the court as counselors or lawyers of the States in dispute, was not settled in 1899. The Russian delegation believes that the time has come for settling this matter.

His Excellency Sir **Edward Fry** supports the proposition of his Excellency Mr. MARTENS.

He also believes that it is not compatible with the dignity of the members of the Permanent Court to plead before their colleagues as agents of the parties.

All the Russian propositions [1] are referred to the committee of examination.[2]

The **President** reads aloud Articles 23, 24, 25, 26 of the Convention: they give rise to no remarks.

ARTICLE 23

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed.

ARTICLE 24

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by direct agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the arbitrators.

The tribunal of arbitration assembles on the date fixed by the parties.

[355] The members of the Court, in the performance of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 25

The tribunal of arbitration sits ordinarily at The Hague.

Except in cases of necessity, the place of session can only be altered by the tribunal with the assent of the parties.

[1] Articles 22 to 27.
[2] Annexes 10 and 75.

ARTICLE 26

The International Bureau at The Hague is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers, or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

The **President** reads aloud Article 27.

ARTICLE 27

The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

An additional proposition bearing the number 27 *bis* is presented to this article by the delegation of Peru.[1]

In its turn, the Chilean delegation has amended this proposition.[2]

His Excellency Mr. **Carlos G. Candamo** justifies, in the following words, the proposition of Peru.[1]

Since the Conference of 1899, numerous arbitration treaties have been concluded, and, at this second Conference new propositions for obligatory arbitration have been presented; the idea having gained ground, it may be hoped that a new forward step will be taken, and that the principle of obligatory arbitration will be enacted and that cases of its application will be consecrated.

But these treaties of permanent arbitration apply only to differences of a juridical nature or to the interpretation of treaties already existing between the contracting parties. They permit us only a glimpse of the possibility of arbitration for subsidiary disputes, for such disputes as may be called slight frictions.

Certain projects submitted to the Second Conference, especially those presented by Sweden, Portugal and the United States also relate to difficulties of the same nature, pecuniary damages, differences relative to the interpretation or the application of certain conventions of an economic, civil or social nature.

But to stop here is not enough; it would mean restriction of arbitration to a narrow field outside of which it is regarded as impossible. Having
[356] considered the less serious disputes, we should think also of the more considerable ones. It will be necessary to remove the barrier that has been set up by doing away with arbitration for the questions that involve the essential interests or the honor of the States.

In the first place, nothing is so difficult as to determine what should be made to come within the field of the essential interests of a State; and it would then always be possible to invoke that consideration to make any arbitration impossible. In dealing with obligatory arbitration the distinction

[1] Annex 15.
[2] Annex 16.

is perhaps necessary; it is certainly not necessary when voluntary arbitration is concerned.

In proposing the adoption of Article 27 *bis*, the Peruvian delegation does not aim to create obligation for arbitration with regard to the most serious disputes; it means merely to make arbitration possible, and this is quite a different thing. It means that there will be offered in such cases, new facilities to the contending States. The path thus opened to the parties by this article, consists in calling forth on the part of the Power most inclined to arbitration, an unequivocal manifestation of its good will.

It is through a declaration made by the Hague International Bureau that the Power will show its favorable disposition, and this agency will communicate the declaration to the other Power and serve at the same time as a medium for any exchange of views that may lead to the conclusion of a *compromis*.

Such a declaration presented to the International Bureau, which at The Hague represents the signatory Powers of the Convention of 1899, has nothing that may be interpreted as affecting the dignity of the State; it is, on its part, an honorable act that will permit it to show clearly what it believes to be the just claims and the force which it claims to secure from its right.

For those disputes involving the vital interests and the honor of a State, this manner of proceeding seems, furthermore, to be the only one that may offer some chance of success. There is absolutely no reason why differences, however great they may be, may not find their settlement in arbitration; and it would be in contradiction to the very object of this Conference to appear to admit that there may be cases where arbitration would be inadmissible. It is proper to extend, as far as it can be done, the means of facilitating the spontaneous and voluntary recourse to arbitration, to stimulate and encourage pacific regulations. Arbitration must always be possible; arbitration should always take the place of war.

His Excellency Mr. **Domingo Gana** explains the Chilean amendment.[1]

The amendment to the Peruvian proposition presented by the Chilean delegation has in mind the following objects:

To establish, in connection with the first part of this proposition, that the cases of disputes contemplated therein must not deal with facts or disputes anterior to the Convention at present under discussion.

The Chilean amendment does not therefore touch upon the essential part of the Peruvian proposition; it merely purposes to give precision to its field of action.

Chile is disposed to give its approval to any reasonable effort that might seek to facilitate and develop obligatory arbitration, but solely for questions or disputes that any future cause might produce. With this express reservation, we are disposed to welcome the idea contained in the first part of the Peruvian proposition which, moreover, we have incorporated in our amendment.

As to the second part of said proposition, it has seemed to us that, in the main, it tends to make ineffective the duty which, according to Article 27, the signatory Powers have imposed upon themselves, and which, at the same
[357] time, attributes to the International Bureau a character of obligatory mediator, a function that is not granted to it by the articles relative to its creation and to its attributions.

[1] Annex 16.

The amendment that we propose seeks to maintain the rôle that the Convention of 1899 has entrusted to the International Bureau, and also, for the purpose of affording, thanks to this rôle, an opportunity to the signatory Powers to fulfill their duty of reminding the States between which a dispute might be on the point of arising, that the permanent court is open to them.

Baron **d'Estournelles de Constant:** The French delegation cannot but take an interest in two propositions both of which are calculated to give real efficacy to the provisions of Article 27.

In voting Article 27, the Conference of 1899 has justly congratulated itself for having included in the text of the Convention a provision tending to facilitate recourse to arbitration. It had been feared that the question of honor might prevent parties in dispute from resorting, at the proper moment, to the new jurisdiction; and it is for this reason that the Conference has introduced into the Convention the idea and the very expression of duty. It decided that in the case of a dispute between two or more of them the signatory Powers should regard it as their duty to remind them of the existence of the Hague Court.

Unfortunately, this rule has hitherto remained almost a dead letter. The propositions before us may permit us to perfect it by supplying the parties themselves with the means of appealing to arbitration, without being stopped by the point of honor, and by inviting them, so to speak, in advance, to address themselves, when occasion arises, to the International Bureau at The Hague. A simple declaration will suffice to show that one of the parties, having confidence in its good cause, is ready to submit to justice.

This declaration, being no more than purely and simply the execution of a convention, will require not the least sacrifice of *amour propre;* public opinion cannot consider it an inadmissible humiliation.

The Peruvian proposition and the Chilean amendment are in agreement for giving to the International Bureau the mandate of receiving and of transmitting this declaration. One of the two propositions states that the declaration shall establish the reasons thereof and that the Bureau shall place itself at the disposal of the parties. We believe that the rôle of the Bureau must be simplified as much as possible and reduced to the rôle of a transmitting agent. In this respect, the Chilean amendment would therefore receive our preference. It seems to us equally very fortunate that the Bureau should acquaint the signatory Powers with the declaration laid before it, in order that they may, to the extent in which they may deem it proper, exercise their right of a conciliatory action; this will be for them the occasion of fulfilling the duty that they assumed in signing Article 27. Finally, it is but natural that, having to communicate the declaration which it is requested to transmit, the Bureau should likewise be expected to forward the answer.

The amendment of our honorable colleagues of Chile offers a further modification to the Peruvian proposition by stipulating that it contemplates merely those disputes that are not connected with facts that have taken place anterior to the present Convention. It is indeed clear that the Convention that we are engaged in preparing, no more than the preceding Convention, shall have a retroactive effect under pain of causing infinite complications. Everyone is agreed in thinking that between the totality of nations of the world there exists a considerable number of old disputes which neither arbitration nor war could settle, and which are subject only to the mutual consent of the parties.

As amended by the Chilean delegation, Article 27 *bis* of the Peruvian project seems to us to constitute an appreciable progress. It has this advantage
[358] of attributing to the Hague International Bureau a function which in and by itself justifies its existence, without however granting it any new initiative, and without in any way involving its responsibility. Nor is it possessed of what one might readily term "an international sinecure," but of a machinery ever available to the Powers; it is a post of security which, without awakening susceptibilities or suspicions, exactly meets the progress of our time and the exigencies of public opinion.

His Excellency Mr. **Choate** requests to be permitted to take the floor in order vigorously to support the Peruvian proposition [1] as amended by the Chilean delegation [2] and seconded by the French delegation.

He agrees with Baron D'ESTOURNELLES DE CONSTANT in admitting that Article 27 of the Convention of 1899 is of great usefulness, but that, nevertheless, it has not yielded the important services which were by right expected from it.

Its efficacy, however, and its great importance have been brought to the test in America. No one, doubtless, has forgotten how, by a happy application of its principle, President ROOSEVELT has succeeded, several times, in preventing war that threatened to break out between several South American States, or at least in shortening that war.

The opportunity afforded by this article to third parties has a great importance; but the proposed article is perhaps still more practical. It offers, in effect, to the parties in dispute themselves an easy means—the only practicable one, perhaps—of having recourse to arbitration, at very embarrassing times. We know how difficult, and sometimes how dangerous, it is for a Government when it is forced more or less in spite of itself into the clash of arms, to make concessions to its adversary apparent even to the public; and we know how prudently it must take the initiative in a recourse to arbitration which is often very ill received. At such times hesitation may prove fatal and everything be lost.

But according to the very simple system which has just been explained the task will be notably facilitated. The system proposed by Peru and Chile opens a new door to conciliation; it means a decided progress, and is indeed a great benefit to mankind. The United States delegation gives its warm and hearty support to the authors of the proposition. (*Applause.*)

His Excellency Sir **Edward Fry** also desires vigorously to support the French and American declarations in favor of the proposition of Article 27 *bis*.

His Excellency Mr. **Martens** recalls that in 1899 the Russian delegation, with all its might, supported the principle of Article 27, and declares that even now, any proposition presented with a view of making the provision more efficacious, without involving the sovereignty of the States, is certain of meeting with its full approval.

It is understood, of course, that the Bureau will confine itself to the transmittal of the propositions that will be laid before it, and that it will exercise no diplomatic function whatever.

His Excellency Mr. **Ruy Barbosa** gives his approval to this proposition as amended by Chile in such manner as will give it no retroactive effect.

[1] Annex 15.
[2] Annex 16.

He has asked to be permitted to speak in order to say but a few words and to express his satisfaction with regard to the declaration made by Mr. D'ESTOURNELLES DE CONSTANT, concerning the principle that the stipulations adopted in this Conference can have no retroactive effect, even as stated in the Chilean amendment, and as declared in a previous formal statement by the Brazilian delegation in the meeting of July 9.

The **President** states that Article *27 bis* and the amendments submitted are, in consequence, taken under consideration and referred to the committee of examination.

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ARTICLE 28

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It addresses to them an annual report on the labors of the Court, the working of the administration, and the expenditure.

(*No remarks.*)

ARTICLE 29

The expenses of the Bureau shall be borne by the signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

(*No remarks.*)

The subcommission proceeds to the study of Chapter III.

Mr. **Loeff**: If the committees of examination of our subcommission succeed in the realizing to a certain extent, as we hope they may, the principle of the permanence of the arbitration court and also the principle of obligatory arbitration, we will owe this result in the first place—speaking the language of the Convention that we are engaged in discussing—to the good offices and to the mediation, so happily and so opportunely offered by you, Mr. President, at our last meeting.

Nevertheless, if I am not mistaken, that realization to become a fact, must conquer more than one obstacle and overcome more than one difficulty.

Arbitral procedure—to refer to that alone at this time—must, so it seems to me, be in various respects an altogether different procedure for the really permanent court than for the present Court; also, the articles relative to the constitution of an arbitral tribunal, other than the present Court, cannot be applied for the cases of obligatory arbitration in the new system; in short, it

will be necessary, as it appears, not only to subject the regulation of procedure to a complete revision, but to complete it through the insertion into the Convention of an entirely new chapter. And in this new chapter it will perhaps even be necessary to adopt new principles not contained in the present regulation. I think—to refer to only two of such principles—of the principle of the publicity of the meeting and of that of the secrecy of the council chamber.

It will be the honorable task of the committee of examination to prepare this work and to envisage these questions with great wisdom.

[360] While awaiting the results of this work, permit me, Mr. President, in the name of the Netherland delegation, to call, for a few short moments, the kindly attention of this high assembly to another question of procedure which seems to me as of equal importance for the present arbitral procedure and for the procedure to be adopted for the future permanent court, a matter which, although unquestionably a matter of detail, seems to me, if I am not mistaken, to be of real and general interest.

One of the articles of this Chapter III that we have just taken up, that is Article 52, states the essential conditions that must be met by the arbitral decision, that is to say, the decision must be based upon reasons, prepared in writing and signed by each of the members of the tribunal.

In the next place, the second paragraph of that same article adds:

> Those members who are in the minority may record their dissent when signing.

It is with regard to this second paragraph that I would ask your particular attention.

In putting their signature to the decision, the members constituting the minority, may record their dissent.

This is, so it seems to me, a clause which in case one or several arbitrators were to avail themselves of it, will lead rather to harmful than to useful consequences and which, for this reason, should be omitted altogether.

In vain we will study the acts of the First Conference to find the reasons that have led to this provision; none will be found; it is therefore impossible to form an opinion with regard to this matter.

But what it is possible to do is to state that this provision seems in flagrant opposition with one of the great fundamental principles of arbitral procedure, the principle which declares that the arbitral decision should be a definitive *omni sensu* decision, not merely definitive in the sense that it cannot be appealed to a second tribunal, but also in this other sense that, in so far as possible, the decision settles any ulterior discussions, and that especially after it has been rendered it shall result in no discussions outside of the precincts of the tribunal.

Mr. President, we are, all of us, acquainted with the adage, "Roma locuta est, res finita est."

Well now, it seems to me most urgent that this same adage be applied to the arbitral decision and that it may be said of that decision even as justly: "Tribunal locutum est, res finita est." As has been stated so eloquently in the course of the last weeks by many of our distinguished colleagues, arbitral procedure needs to have the absolute confidence of the peoples; and in consequence, what it must most scrupulously avoid is anything that can undermine or even diminish that confidence. But, in permitting the members constituting the

minority to record their dissent, and thus communicating such dissent to publicity, we are, as it were, resuscitating outside of the precincts of the tribunal, the dispute interred within these precincts; we are thus reopening the discussions and exposing ourselves to the danger of rousing suspicion with regard to the merits of the decision; in short, we are undermining confidence in the arbitral decision.

It is for these reasons, Mr. PRESIDENT, that I venture to submit to the prudent wisdom of this high assembly and to that of this committee of examination in the first place, the question as to whether it would not be well to suppress the provision contained in the second paragraph of Article 52, so that record of the dissent of the minority of the judges be forbidden in future. It goes without saying that the question in discussion would become more important in proportion as recourse to arbitration would become more frequent; it is therefore especially in the relation to the institution of a really permanent arbitration court and to the eventual insertion in the Convention of 1899 of certain cases of obligatory arbitration that it should be envisaged. At all events, the suppression of the said clause and the inhibition to the judges of recording
[361] their dissent in the decision, could not, in our opinion, but affirm the independence of the arbitrators while at the same time they would increase the confidence which their decisions must have. (*Applause.*)

His Excellency Mr. **Martens** observes that the text of this article is explained by a very old usage in arbitral practice.

The minority whose opinion has frequently been disregarded only by the vote of the umpire has always desired to have its opinions regarded in the arbitral decision. Nevertheless, Mr. MARTENS admits the justice of the criticisms of Article 52 and does not oppose its being referred to the committee of examination.

Then passing on to the proposition of a general nature offered by Mr. LOEFF, Mr. MARTENS states that in his judgment the moment has not yet arrived for legislating and that it is proper to leave it with the courts to work out their own regulations.

Mr. **Loeff,** in thanking his Excellency Mr. MARTENS for his support and for the information he has given the members of the Commission, states that he has presented no formal proposition and that, for the moment, it has been only his intention to offer some remarks for the attention of the committee of examination.

His Excellency Sir **Edward Fry** concurs in the remarks of his Excellency Mr. MARTENS.

Articles 30 and 31 give rise to no remarks.

ARTICLE 30

With a view to encourage the development of arbitration, the signatory Powers have agreed on the following rules which shall be applicable to arbitral procedure, unless other rules have been agreed on by the parties.

ARTICLE 31

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are clearly defined the subject of the dispute and the extent of the arbitrators' powers. This act implies an engagement of the parties to submit in good faith to the arbitral award.

Article 32 is then taken up.

ARTICLE 32

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present act.

Failing the composition of the tribunal by direct agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

Mr. **Louis Renault** states that he will explain, after reading of all the articles of the Convention has been concluded, the reasons that prompted [362] the French proposition [1]; for this proposition does not aim to amend the Convention at present in force, but to complete it.

It must therefore be discussed in its totality.

His Excellency Mr. **Mérey von Kapos-Mére** proposes to add to this article a new paragraph reading as follows: [2]

> In case the tribunal is composed of but three arbitrators, the members of the Permanent Court named by the litigant parties as also the *ressortissants* of these last cannot become members of the tribunal.
>
> If, on the other hand, the tribunal is formed of five members, each party shall be free to choose as arbitrator either one of the persons designated by it as a member of the Permanent Court, or one of its *ressortissants*.

The insertion of such a clause is to be recommended with the view of assuring the impartiality of the tribunal. For, if the tribunal is formed of but three members of which two would be *ressortissants* of the litigant parties or named by these last as members of the Permanent Court, the arbitral decision would really be placed in the hands of the umpire who would act, in a way, as sole judge, the national arbitrators of the parties or those named by them very often being brought to act in favor of the State of which they are *ressortissants* or which has designated them.

Also, experience has proved that, whereas the awards of arbitral tribunals, when they have not been composed of the nationals of the parties, have been unanimously agreed upon, this unanimity has been wanting in contrary cases. (*Alabama* question; perpetual leases.)

His Excellency Mr. **Lou Tseng-tsiang** makes the following declaration:

The delegation from China adheres to the proposition that has been submitted by the Austro-Hungarian delegation and vigorously approves the addition to Article 32 of the new paragraph proposed by our very distinguished colleague, his Excellency Mr. MÉREY VON KAPOS-MÉRE.

The Austro-Hungarian proposition is referred to the committee of examination.

Article 33 does not give rise to any remarks.

[1] Annex 9.
[2] Annex 17.

ARTICLE 33

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

Article 34 is then taken up.

ARTICLE 34

The umpire is *ex officio* president of the tribunal.

When the Tribunal does not include an Umpire, it appoints its own President.

His Excellency Mr. **Martens** states, in order to explain the Russian proposition,[1] Article 33, that practice has shown since 1899 that an umpire may possess all the desired qualities to give the casting vote in a juridical question when the votes of the other judges are equally divided, and yet not possess the qualities required of an eminent president. It seems excessive, therefore, to impose an umpire upon the parties as president of the tribunal; they must, in this respect, have the absolute freedom of choice.

The Russian proposition is referred to the committee of examination.

Articles 35, 36 and 37 give rise to no remarks.

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ARTICLE 35

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

ARTICLE 36

The tribunal's place of session is selected by the parties. Failing this selection the tribunal sits at The Hague.

The place thus fixed can not, except in case of necessity, be altered by the tribunal without the assent of the parties.

ARTICLE 37

The parties are entitled to appoint delegates or special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

Article 38 is then taken up.

ARTICLE 38

The tribunal decides on the choice of languages to be used by itself, and to be authorized for use before it.

His Excellency Mr. **Martens** insists upon the advantage there is in fixing in advance in the *compromis* the official language of arbitral procedure.[2]

Mr. **Louis Renault** is of the opinion that this matter must be settled by the committee of examination.

He declares, however, that in his judgment the arbitral tribunal is the most competent authority to decide with regard to the choice of languages: this right must be left to it in all cases when the *compromis* is silent in respect of the matter.

His Excellency Mr. **Asser** also believes that it is the authority that will be

[1] Annex 11.
[2] *Ibid.*

expected to settle the questions in regard to which the *compromis* has not made any declaration, and that it must decide as to the choice of languages.

His Excellency Mr. **Mérey von Kapos-Mére** proposes to combine Articles 38 and 31 and to refer them to the committee of examination.

It is so decided.

Article 39 gives rise to no remarks. Article 40 together with the Russian proposition [1] are referred to the committee of examination.

ARTICLE 39

As a general rule arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of all printed or written acts and of all documents containing the grounds relied on in the case. This communication shall be made in the form and within the time fixed by the tribunal in accordance with Article 49.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

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ARTICLE 40

Every document produced by one party must be communicated to the other party.

The **President** then reads aloud Articles 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 53, all of which give rise to no remarks.

ARTICLE 41

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes alone have an authentic character.

ARTICLE 42

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 43

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 44

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal, the tribunal takes note of it.

ARTICLE 45

The agents and counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 46

They are entitled to raise objections and points. The decisions of the tribunal on those points are final, and cannot form the subject of any subsequent discussion.

[1] Article 41; see annex 11.

ARTICLE 47

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions can be regarded as an expression of opinion by the tribunal in general, or by its members in particular.

ARTICLE 48

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of international law.

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ARTICLE 49

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 50

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case, the President pronounces the discussion closed.

ARTICLE 51

The deliberations of the tribunal take place in private.

Every decision is taken by a majority of members of the tribunal.

The refusal of a member to vote must be recorded in the minutes.

ARTICLE 52

The award, given by a majority of votes, must state the reasons on which it is based.

ARTICLE 53

The award is read out at a public sitting of the tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

ARTICLE 54

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitively and without appeal.

Articles 52 and 54, as well as the Italian propositions relating thereto [1] are referred to the committee of examination.

ARTICLE 55

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award, and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly

[1] Annex 14.

recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

His Excellency Mr. **Martens** proposes the suppression of this article.[1] He reminds the members of the Commission of the discussion that arose within the Conference of 1899 regarding the matter of revision of arbitral decisions. As for himself, he remains a convinced opponent of revision which he regards as contrary to the very idea of arbitration.

[366] He states that this question was taken up again in 1902 by the arbitrators who met at The Hague. In a letter addressed to the minister of foreign affairs, the tribunal was unanimous in calling for the suppression of this Article 55.

His Excellency Mr. **A. Beernaert** does not see what principle the revision of an arbitral decision could violate and calls for the retention of Article 55.

His Excellency Mr. **Asser** calls attention to the fact that the present phraseology of the article is a transactional provision which is due to his initiative. He is in no way opposed to the study of the Russian proposition,[2] but is in favor of the retention of the article.

His Excellency Mr. **Choate** hopes that no change will be made in the text of Article 55. Any tribunal may make a mistake. New facts, not known at the time that the decision was made, may arise and it would be regrettable not to be able to revise a decision under such circumstances. The sole object of arbitration is justice, and, in order to merit public confidence, every tribunal must leave room for the right to consider its errors.

The considerations which in 1899 made for the adoption of the present text of the article have lost nothing of their value.

The same reasons that determined the Conference of 1899 to vote revision, exist to-day.

His Excellency **Samad Khan Momtas-es-Saltaneh** supports the views expressed by Mr. CHOATE.

Article 55 must be retained for the reason that revision of the arbitral decision must not be made impossible. Why should another system be adopted than the one in the judicial decision? It is certain that the case will not occur frequently, but it is possible that an error may be committed and in that case the possibility of a revision of the decision will alone repair such error and bring about justice.

His Excellency Mr. **Martens** submits three considerations in support of his proposition.

In the first place he declares that it is the main object of arbitration to settle a dispute. Revision, therefore, runs counter to this very object, since it offers the Powers in dispute the possibility of perpetuating it.

In the second place he remarks that no one of the arbitral decisions rendered by the Hague tribunal has hitherto led to a request for revision.

Finally, he recalls that the arbitrators were unanimous in 1902 in recommending the abolition of the recourse to revision.

His Excellency Mr. **A. Beernaert** entirely disagrees in this respect with his Excellency Mr. MARTENS.

[1] See Annex 11.
[2] *Ibid.*

To his mind, it is not the sole object of arbitration to terminate a dispute; it is, above all things a means of settling by agreement a dispute submitted to the judgment of arbitrators freely elected. All depends, in such case, on the will of the parties; why should we then, by a special provision, forbid them recourse to revision?

His Excellency Mr. **Ruy Barbosa**: I share entirely the opinion of Mr. CHOATE and of Mr. BEERNAERT.

Very far from being contrary to the nature of arbitration, revision is of its very essence. To make this evident, it will suffice to recall that even in private law, in civil procedure, it is everywhere admitted, and to such an extent that, under certain legislations, any clause by which the parties might renounce such right is declared as null and void.

[367] Now, if in arbitration within the field of private law, when the dispute takes place between one individual and another individual, the remedy of revision is a right generally guaranteed to the victims of sentences tainted with essential faults, it is manifest that, *a fortiori,* such remedy cannot be denied, when the parties are nations, States, sovereignties.

One of the most eminent experts of the contrary opinion thought that he was here favoring it, but a few moments ago, by informing us that in the four arbitrations decided by the Hague Court, not one of the interested nations has ever invoked this right which is consecrated by Article 55 of the Convention of 1899. But, though the facts were even more numerous, they would only prove in those decisions, the absence of those essential faults that establish the right to revision. Furthermore, they might also serve to ease our minds, by finding in experience that we need not fear the too frequent recourse to this right on the part of the nations.

But it is still further alleged in opposition to revision that in the questions hitherto settled by the Hague Court, the arbitrators have expressed themselves in favor of suppressing the right recognized by the Convention of 1899 to the parties in dispute of reserving unto themselves in the *compromis* the right to call for revision. This argument does not seem to me to have any greater weight than the rest. The opinion of those who exercise arbitration, of those who are arbitrators by trade, by reason of a permanent mandate, is suspicious in so far as revision is concerned. It is quite natural that by reason of their professional turn of mind they desire to remove the possibility of a revocation of arbitral decisions.

To forbid absolutely the revision of such decisions would be to attribute to the arbitrators a kind of infallibility. May not arbitral decisions feel the effect of errors committed against the evidence of facts or against the certainty that results from proofs? This cannot be denied. But there would be nothing more harmful to the authority of arbitration than to assure to such judgments the privilege of incontestability. We must cling to the idea that arbitration is a means of peace only because it is an instrument of justice. It would, therefore, be illogical to sacrifice the interests of justice to those of peace. Patriotism is praiseworthy only when it is based upon right. Revision is a guarantee of it in the case of error in the decision. And what is it you would gain by destroying that guarantee? You would merely render arbitration less desirable to the nations in dispute, render arbitration cases less frequent, and restrict the patronage of arbitration. If that which is desired is for the purpose of generalizing

the use of arbitration, let us not then burden it with arbitrary and odious conditions contrary to its very nature and irreconciliable with the exigencies of an efficacious search for the truth.

His Excellency Mr. **Martens** desires to make a rectification. The arbitrators, in 1902, referred only to the principle of revision without any allusion whatever to the decision rendered by them.

His Excellency Mr. **Beldiman** remarks that the mere suppression of Article 55 would not settle the question. So long as States are not formally forbidden to have recourse to revision, they are at liberty to provide for it in the *compromis*.

His Excellency Baron **Marschall von Bieberstein** agrees with his Excellency Mr. BELDIMAN. The fundamental principle in arbitration matters is liberty. The suppression of Article 55 would not deprive the parties of their right to stipulate the eventual ratification of an arbitral decision; it would merely create a gap in the Convention in case the *compromis* were silent on the matter.

This provision seems to him indispensable and he would have proposed its insertion if it had not already been provided for.

[368] His Excellency Mr. **A. Beernaert** appeals to all the partisans of arbitration, and requests them not to place any obstacles in the way of its development and to keep recourse to it easy.

The Russian proposition is referred to the committee of examination together with the remarks exchanged in respect thereto.

Articles 56, 57, 58, 59, 60 and 61 of the Convention give rise to no remarks.

ARTICLE 56

The award is binding only on the parties who concluded the *compromis*.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter notify to the former the *compromis* they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 57

Each party pays its own expenses and an equal share of the expenses of the tribunal.

GENERAL PROVISIONS

ARTICLE 58

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers that were represented at the International Peace Conference at The Hague.

ARTICLE 59

The non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known their adhesion to the contracting Powers by a written notification addressed to the Netherland Government and communicated by it to all the other contracting Powers.

ARTICLE 60

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 61

In the event of one of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals thereto.

[369] Done at The Hague, July 29, 1899, in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

(*Signatures*)

The **President** grants the floor to Mr. LOUIS RENAULT to enable him briefly to explain the spirit of the French proposition regarding summary procedure.

Mr. **Louis Renault** speaks as follows: The French proposition [1] contains a body of rules intended to settle the most frequent arbitration cases—technical questions and matters of secondary importance—and demanding a prompt solution.

We thought that it was possible for these cases to have the arbitral procedure instituted in 1899 operate under simpler and more practical conditions, and we have availed ourselves to that end of the *compromis* clauses already incorporated in several treaties—especially in those of Switzerland with Germany, France and Italy. The fundamental idea of our project is the simplification of the organization of the arbitral tribunal and its specialization. For the cases hereinbefore mentioned, the arbitrators need not necessarily be members of the permanent court; they may be specialists freely appointed by the parties.

Mr. RENAULT then calls the attention of the subcommission to Article 7. In this an attempt has been made to make acceptable to all an arbitral decision rendered between two States upon disputes that are of interest to a large number of Powers.

Mr. RENAULT will explain in the committee of examination the details of the French proposition which is referred to it.

His Excellency Baron **Marschall von Bieberstein** expresses his thanks to the French delegation for its eminently practical propositions which will contribute to simplifying arbitral procedure and to facilitating its use.

The **President** informs the subcommission that the report of Baron GUILLAUME on the commissions of inquiry is already completed. However, with the approval of the subcommission it is agreed that only upon the close of the labors of the committees of examination, all the reports shall be read in the plenary meetings of the Commission.

The meeting closes at 5 o'clock.

[1] Annex 9.

FIRST COMMISSION

FIRST SUBCOMMISSION

COMMITTEE OF EXAMINATION A

[373]

FIRST MEETING

JULY 13, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The **President** recalls the manner in which, in its last meeting, the First Commission decided, according to the precedents of 1899, to establish the committee of examination which is in session this morning for the first time.

He makes known that, in agreement with the German delegation, Mr. KRIEGE takes the place of Mr. ZORN in the committee.

The PRESIDENT then declares the committee organized.[1]

Present, either as honorary presidents of the Conference or as members of the first subcommission of the First Commission, or finally, as members of the committee:

For Germany: Mr. KRIEGE.

For the United States of America: Mr. JAMES BROWN SCOTT.

For Austria-Hungary: his Excellency Mr. MÉRE VON KAPOS-MÉRE and Mr. HEINRICH LAMMASCH.

For Belgium: his Excellency Baron GUILLAUME.

For Brazil: his Excellency Mr. RUY BARBOSA.

For France: his Excellency Baron D'ESTOURNELLES DE CONSTANT and Mr. FROMAGEOT.

For Great Britain: his Excellency Sir EDWARD FRY.

For Italy: Mr. GUIDO FUSINATO.

For the Netherlands: his Excellency Mr. ASSER.

[374] For Portugal: his Excellency Mr. ALBERTO D'OLIVEIRA.

For Russia: his Excellency Mr. MARTENS.

The PRESIDENT opens the discussion by briefly summarizing the rôle and the task of the committee of examination. It is the committee's mission to study the modifications proposed to the Convention of 1899 as they have been submitted to it by the Commission. The invariable rule which is to control the labors

[1] After successive discussions made by the First Commission, the committee of examination A was constituted. The definitive list is as follows: PRESIDENT, his Excellency LÉON BOURGEOIS; *Vice President*, Mr. GUIDO FUSINATO; *Reporter*, his Excellency Baron GUILLAUME; *Secretary*, Baron D'ESTOURNELLES DE CONSTANT; *Honorary Presidents of the First Commission*, his Excellency Mr. MÉREY VON KAPOS-MÉRE, his Excellency Mr. RUY BARBOSA, his Excellency Sir EDWARD FRY; *Vice Presidents of the First Commission*, Mr. KRIEGE, his Excellency Mr. CLÉON RIZO RANGABÉ, his Excellency Mr. POMPILJ, his Excellency Mr. GONZALO A. ESTEVA; Members, his Excellency Mr. ASSER, Mr. FROMAGEOT, Mr. HEINRICH LAMMASCH, his Excellency Mr. MARTENS, his Excellency Mr. ALBERTO D'OLIVEIRA, Mr. JAMES BROWN SCOTT, his Excellency Mr. FRANCISCO L. DE LA BARRA, his Excellency Mr. CARLIN, his Excellency Mr. LUIS M. DRAGO, his Excellency Mr. HAMMARSKJÖLD, Mr. LANGE, his Excellency Mr. MILOVAN MILOVANOVITCH, his Excellency General PORTER.

Mr. GEORGES STREIT took the place of his Excellency Mr. CLÉON RIZO RANGABE, who could not attend.

is that any article of the Convention of 1899 which has not been modified by a vote of the present Conference, remains in force.

The PRESIDENT reviews the various documents and the propositions which have been communicated to the committee in perfect order—each document bearing a regular number—through the care of the Secretary General, and distributed also, for information, among all the members of the Conference under the name of annexes of the first subcommission of the First Commission.

Up to this day there are thirty-two of these annexes. They are divided into two quite distinct categories:

1. Communications of documents intended to inform the Conference, historical and juridical documents that may illuminate our discussions.

2. The propositions themselves constituting the substance of our discussions and the very object of our labors.

We shall acquaint, or we have already acquainted ourselves with each of these documents, as well as with all those which may be submitted subsequently.

The following is their list (to No. 1 above):

1. Communications of an informatory character.

(Mexico) Communication of the arbitration treaty signed at Mexico, January 30, 1902.[1]

(Great Britain) Communication by his Excellency Sir EDWARD FRY, concerning the function of the general secretariat for the commissions of inquiry.[2]

(Brazil) Communication of the text of the Declaration adopted August 7, at Rio de Janeiro, by the Third American International Conference.[3]

(Argentine Republic) Collection of the arbitration treaties signed by this Power.[4]

(Holland) Documents concerning the procedure of the Permanent Arbitration Court collected by the Netherland Government.[5]

(Uruguayan Republic) Collection of the arbitration treaties signed by this Power.[6]

Synoptical table of the modifications proposed.[7]

(Italy) Collection of the arbitration treaties signed by this Power.[8]

The committee records the fact of the deposit of these eight documents of which mention will be made in the minutes.

Of the thirty-two annexes which are before us only twenty-four remain, therefore, to be discussed; these represent the twenty-four modifications proposed to the Convention.

The following is their list (to No. 2 above):

Proposition 1 (Germany) Part IV, Chapter 3 (Articles 31 and 34).[9]
" 2 (France) Commissions of inquiry. Part III.[10]
[375] " 3 (France) Summary arbitration procedure. Part IV, Chapter 3.[11]
" 4 (Russia) Commissions of inquiry. Part III.[12]
" 5 (") Part IV, Chapter 2 (Articles 22 and 23).[13]
" 6 (") Part IV, Chapter 2 (Articles 24, 25, 26 and 27).[14]

[1] Annex 60.
[2] Annex 61.
[3] Annex 62.
[4] Annex 63.
[5] Annex 64.
[6] Annex 65.
[7] Annex 69.
[8] Annex 66.
[9] Annex 8.
[10] Annex 1.
[11] Annex 9.
[12] Annex 2.
[13] Annex 10.
[14] Annex 75.

Proposition 7 (Russia) Part IV, Chapter 3 (Articles 33, 38, 41 and 55).[1]
" 8 (Germany) Part IV, Chapter 2 (Articles 22 and 23), Chapter 3 (Articles 37, 38, 39, 40, 42, 43, 51 and 57).[2]
" 9 (Argentine Republic) Part IV, Chapter 3 (Article 57).[3]
" 10 (Italy) Amendment to propositions No. 3 (France), No. 5 (Russia) Part III. The commissions of inquiry and to Articles 13, Part III; 52 and 54, Part IV of the Convention.[4]
" 11 (The Netherlands) Amendment to proposition No. 4 (France) and to Articles 2, 6, 7, 9, 16 and 24 of the Convention.[5]
" 12 (Great Britain) The commissions of inquiry. Part III.[6]
" 13 (The United States) Recovery of debts. Part IV, Chapter 1 (Article 19).[7]
" 14 (Uruguayan Republic) Obligatory arbitration. Part IV, Chapter 1 (Article 19).[8]
" 15 (Haiti) Chapter 1 (Articles 8, 9 and 16) Parts III and IV.[9]
" 16 (Serbia) Obligatory arbitration. Part IV, Chapter 1 (Article 19).[10]
" 17 (Peru) Part IV, Chapter 2, (Article 27).[11]
" 18 (Portugal) Obligatory arbitration. Part IV, Chapter 1 (Article 19).[12]
" 19 (The United States) Permanent Court. Part IV, Chapter 2 (Article 20 and following).[13]
" 20 (The United States) Obligatory arbitration. Part IV, Chapter 1 (Article 19).[14]
" 21 (Sweden) Obligatory arbitration. Part IV, Chapter 1 (Articles 15, 16, 17, 18 and 19).[15]
" 22 (Dominican Republic) Recovery of debts. Amendment to proposition No. 18 (the United States) Part IV, Chapter 1 (Article 19).[16]
" 23 (Chile) Part IV, Chapter 1 (Article 19).[17]
" 24 (Brazil) Part IV, Chapter 1 (Article 19).[18]

After this mention of the twenty-four propositions submitted for the present to the examination of the committee, the PRESIDENT states that the method of work to be followed is dictated by the order itself of the articles of the Convention of 1899. Each proposition, or the different propositions related to one or to several articles of the Convention, will be discussed at the time of the regular reading of this article or of these articles.

It will not always be easy to put the various propositions into their proper place, and for this reason, the general secretariat has been good enough to draw up the valuable synoptical tables of which we have already received the first two numbers. These still imperfect numbers will little by little gain on one

[1] Annex 11.
[2] Annex 12.
[3] Annex 13.
[4] Annexes 3 and 14.
[5] Annex 4.
[6] Annex 5.
[7] Annex 59.
[8] Annex 47.
[9] Annexes 6 and 49.
[10] Annex 18.
[11] Annex 15.
[12] Annex 19.
[13] Annex 76.
[14] Annex 20.
[15] Annex 22.
[16] Annex 51.
[17] Annex 52.
[18] Annex 23.

[376] another and will finally be grouped in a general table; at present they are but an approximation, a way of facilitating the work.

Upon the conclusion of this preliminary outline, the PRESIDENT requests the committee to begin its labors with the reading of the first articles of the Convention of 1899, Parts I and II having already been read without discussion before the Commission; this should be followed by an examination of the propositions connected with Part III on commissions of inquiry. Subsequently, the committee would pass to a further examination of the Convention, that is to say, to Chapter 1 of Part IV, and to the discussion of the important propositions relative to obligatory arbitration and to the recovery of debts, propositions of which the Commission itself has not yet discussed the principle.

This is indeed the judgment of the committee.

Before proceeding with the reading of the articles, the PRESIDENT certifies to the following with regard to his Excellency Mr. RUY BARBOSA.

At the meeting of the First Commission, July 9, his Excellency Mr. RUY BARBOSA deposited a proposition which has been distributed,[1] but at the same meeting he had previously declared that:

> In case any agreement should be reached in regard to the principle of obligation applicable to international arbitration for disputes of a legal nature or with regard to the interpretation of treaties, no matter under what form it may be adopted, the Government of the Republic of the United States of Brazil, desires to declare, preliminarily, that it does not and will not consider that this principle may be extended to questions and litigations pending, but only to those which might arise after its act of adhesion of June 15, 1907, to Convention I of the First Hague Conference.[2]

His Excellency Mr. **Ruy Barbosa** desires to have this declaration kept separate from the minutes and joined to the annexes after the other propositions are deposited.

It is so ordered.

Baron **d'Estournelles de Constant** avails himself of this opportunity to set forth the importance that all should present their propositions as "propositions," in order that they may not risk the danger of escaping the attention of the secretariat, and that they may not in future lose the benefit of the order in which they were deposited. Although most zealous in their work the secretaries and the bureau are frequently in danger of confusing a remark, a declaration and a proposition, if their character is not determined by its author.

His Excellency Sir **Edward Fry** makes the following statement:

After an attentive study made in common agreement by the British and French delegations, it has been found possible to fuse the propositions of the two delegations into a single one.[3] In consequence his Excellency Sir EDWARD FRY withdraws his proposition and agrees to the new text of the French proposition, as it will be published and distributed.

Record is entered of this declaration.

A new edition of the synoptical table (first part) will be made and contain the two propositions[4] fused into a single one.

[1] Annex 23.
[2] See p. 212 [216].
[3] Commissions of inquiry, Annexes 1 and 5.
[4] Annex 7.

A discussion takes place with regard to the synoptical table (second part) concerning the place where the propositions relative to obligatory arbitration, and those concerning the recovery of debts are to appear.

Several members ask whether these propositions should not appear opposite the former Article 16 rather than opposite Article 19.

[377] The **President** states that the secretariat had hesitated between these two assignments and that it had finally decided for the end of Article 19, in order not to interrupt the general discussion, but to leave to it full freedom by having it bear at one and the same time upon the whole of the chapter and upon the whole of the propositions deposited; it is necessary, however, to bear in mind objections offered, especially by Mr. JAMES BROWN SCOTT and his Excellency ALBERTO M. D'OLIVEIRA, and it is resolved to redraft the second synoptical table as well, and to carry back to Article 16 the propositions now appearing under Article 19.

The PRESIDENT begins the reading of the articles of the Convention of 1899.

PART I.—THE MAINTENANCE OF GENERAL PEACE

ARTICLE 1

With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

PART II.—GOOD OFFICES AND MEDIATION

ARTICLE 2

In case of serious disagreement or before an appeal to arms, the signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

ARTICLE 3

Independently of this recourse, the signatory Powers deem it expedient that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

ARTICLE 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ARTICLE 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

[378]

ARTICLE 6

Good offices and mediation, undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.

ARTICLE 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted, unless there be an agreement to the contrary.

ARTICLE 8

The signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communications on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

The PRESIDENT states that no modifications have been proposed to Articles 1-8, apart from the amendment of his Excellency Mr. CHOATE already voted by the subcommission and consisting of the addition of the words "and desirable" after the word "expedient" in Article 3.

After the reading of Article 8, the committee takes up the examination of the proposition from Haiti.[1]

Mr. **Fromageot** reads the two texts aloud.

The committee unanimously decides against this amendment.

His Excellency Mr. **Asser** states that he would regret to see any change made in the text as worded by Mr. HOLLS. He is much in favor of this ingenious system of special mediation, and—far be it from his thought of omitting it—he has, since 1899, regretted more than once that no one has thought of utilizing it. In case of an acute controversy, the two mediating States might render signal services to the two opponents; but, how would the action of a mediator chosen by these two States be looked upon?

His Excellency Mr. **Martens** thinks, on his part, that if the two States are in conflict, they would have difficulty in agreeing upon the selection of a mediator.

This opinion is supported by Messrs. KRIEGE, GUIDO FUSINATO, JAMES BROWN SCOTT, and by their Excellencies Mr. MÉREY VON KAPOS-MÉRE and Sir EDWARD FRY.

Article 8 is, therefore, retained without modification.

[379] The committee takes up the reading of Part III.

The **President** reads aloud Article 9.

PART III.—INTERNATIONAL COMMISSIONS OF INQUIRY

ARTICLE 9

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it

[1] Annex 6.

expedient that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

The President in a few words summarizes the contents of the propositions in annexes 1, 2, 3, 4, 5 and 6.

After discussion, the committee decides to put aside the proposition from Haiti [1] which presupposes the acceptance of the Haitian amendment with regard to Article 8. The English and French propositions having been fused into a single text,[2] the committee has before it but four propositions, to wit: the Franco-British, the Russian, the Italian and the Netherland propositions.

His Excellency Mr. **Asser** states that, after the explanations made before the subcommission, he withdraws the Netherland proposition.[3]

His Excellency Mr. **Martens** declares that, in proposing a new text for Article 9,[4] the sole reason of the Russian delegation was to impart more clearness and greater logic to the text. For the present article seems to mean that recourse to the international commissions of inquiry is deemed expedient only in controversies involving neither the honor nor the essential interests of the parties. There is, however, a general agreement in the belief that the so-called incident of the North Sea or of the Hull fishermen seemed to affect the honor and the essential interests of two great nations; and after the very words pronounced by his Excellency Sir Edward Fry in the meeting of July 9, there can be no doubt but that the recourse to the Paris commission of inquiry has been very beneficial to the two parties. His Excellency Mr. Martens would, therefore, have this article drafted in a manner that might not seem to put aside recourse to commissions of inquiry for disputes involving the honor and the essential interests of the parties.

The **President** admits that the text of Article 9 is defective, and he believes that, in fact, the Conference of 1899 has in no way wished to deny the usefulness of commissions of inquiry in controversies involving even the honor or the essential interests of the parties. It should, however, be remembered in what circumstances and under what conditions the Conference of 1899 was able to reach an agreement.

His Excellency Sir **Edward Fry** and Mr **Heinrich Lammasch** declare that the very constitution of the commission of the Hull fishermen proves indeed that the text of Article 9 cannot be interpreted in the restrictive sense attributed to it by his Excellency Mr. Martens. This text cannot be limited.

Mr. **Martens** answers that it seems to him impossible to give the text of 1899 an interpretation other than that which he has given to it. In his [380] judgment, the Russian and British Governments organized the Paris commission *despite* the text of Article 9. In case a dispute so serious were to arise between other Powers the latter must not be exposed to the danger of being stopped in their recourse by this defective text.

His Excellency Sir **Edward Fry** remarks that the Hull fishermen dispute

[1] Annex 6.
[2] Annex 7.
[3] Annex 4.
[4] Annex 2.

did not, in his judgment, involve either the honor or the essential interests of the two States in conflict. At all events, he insists that Mr. MARTENS should take into account the objections which have been submitted to him.

His Excellency Mr. **Martens** answers that, once more, he does not place any obstacle in the way of modifying his proposition. He would, especially, give up the word "*independence*" and agree to the former term: "*essential interests.*"

His Excellency Mr. **Asser** observes that if the words "*deem expedient*" were retained, one might perhaps omit the words: "*of an international nature,* involving neither honor nor essential interests."

Mr. **Fromageot** calls attention to the fact that, as a result of the study of the minutes of 1899, these last words were inserted by reason of certain apprehensions and susceptibilities on the part of the small Powers. These words cannot be omitted without bringing up afresh those same anxieties.

The **President** confirms this remark by appealing to the memory of the members of the committee of 1899. At that time, the committee had only in view the preparation of the establishment of a new procedure; in case of necessity and purely of an optional nature, this procedure was to have been of such a character that the Powers in conflict might have found it readily available. In spite of this twofold nature of an optional simplification the new institution aroused, nevertheless, the fears to which allusion has just been made. These fears were vigorously expressed in the plenary commission. Several members of the Conference stated with force that if the institution of commissions of inquiry could serve as a pretext or as an excuse for an inadmissible interference, they would constitute a threat against the independence of the weakest and a weapon in the hands of the strongest. These fears were certainly not justified, but they could not be overcome and it was necessary to find a basis for conciliation. Thus, by mutual concessions, the text of Article 9 was agreed upon, and, in spite of all, the event has proven that it had its great advantages. At the risk of calling into question the agreement of which it was the result, must we now introduce into the text an improvement which is certainly incontestable? The PRESIDENT does not believe that it is expedient to run such a risk. Nevertheless, in order to allow for the reasonableness of the observations of Mr. MARTENS and to avoid Article 9 being interpreted in future otherwise than it has been interpreted by the Governments of Great Britain and Russia, he proposes that the present discussion be mentioned in the minutes with the necessary amplitude.

His Excellency Mr. **Martens** expresses his thanks to the President and agrees to this manner of compromise. He would wish, nevertheless, that some means might be found to "give force to the recommendation," without affecting the article itself. Might not this be attained by adding a few words?

Mr. **James Brown Scott** insists, on the contrary, upon the integral retention of the article.

His Excellency Baron **Guillaume** also demands the retention of Article 9.
[381] He believes that the application of it in 1905 has been so beneficial for the peace of the world that it has given a striking consecration to the provisions adopted by the First Conference.

The terms of Article 9, furthermore, have not prevented the two countries in controversy from reaching an agreement by which the said terms were given a wider interpretation than that which had been stipulated.

His Excellency Mr. **Mérey von Kapos-Mére**, Mr. **Kriege** and Mr. **Guido**

Fusinato add that a new draft of the article would certainly be unacceptable to the Conference.

His Excellency Mr. **Martens** insists upon the great expediency of removing all idea of limitation from the text of the article. He adds that this limitation has not been made in Article 8. Finally, he states that the present text of Article 9 might paralyze the action of the mediating Powers which might deem it expedient to have an international commission of inquiry established.

His Excellency Mr. **Alberto d'Oliveira** thinks that if two Powers agree to establish a commission of inquiry, they will know full well how to interpret Article 9 in a liberal spirit. It is only in case they should not agree that they would interpret it in a restrictive sense; hence, for want of this restriction they would find another one. The example of the Paris commission is decisive. But, in a more general order of ideas, it seems that the committee must be swayed by the following consideration: the more important a new institution, the more one should avoid that which might alienate general confidence from it, and the more care must be exercised against directing both the Government and public opinion to accept it by constraint. Obligation in this matter would be not a step in advance but a retrograde step; it is within the field of arbitration that we must incline to generalize it, and not within the field of commissions of inquiry.

This reservation with regard to honor and vital interests has a real basis; it has been said and it should be repeated: this reservation is intended to allay the fears of the small States.

Without sharing these fears, the Portuguese delegation would regret to see a modification of a text which, hitherto, has been both efficacious and reassuring.

The **President,** without making it the object of a proposition and solely by way of an indication, suggests a text that would take into account the various considerations that have been expressed:

> In disputes of an international nature arising from a difference in the estimation of questions or fact, especially if these disputes involve neither honor nor essential interests, etc. . . .

His Excellency Mr. **Alberto d'Oliveira** thanks the President for this suggestion, but he would prefer to retain the former text.

The **President** believes that this is indeed the judgment of the majority of the committee.

His Excellency Mr. **Martens** declares that he accepts the situation, but he renews once more his reservations by declaring that the present text of Article 9, no matter what may be thought of it elsewhere, limits the sovereignty of the States. He requests that his reservations be noted in the minutes and in the report.

It is so ordered.

Before taking up the examination of the second modification proposed by the Russian delegation, the committee unanimously adopts the addition of these words *" and desirable"* to the word *" expedient"* in the text of Article 9, in view of the fact that this addition must harmonize with that already adopted for Article 3. It is agreed that, of right, this shall be done for any other article containing these words: *" The Powers deem it expedient."*

[382] In continuation of the examination of the propositions relative to Article

9, the committee then takes up the discussion as to the desirability of adding, at the end of the article, this phrase proposed by the Russian delegation: "*and establishing, if necessary, responsibility therefor.*"

His Excellency Mr. **Martens** restates the explanations already given by him to the Commission; he declares that his proposition has led to an unjustified misunderstanding.

The Russian delegation desires in no way to confuse the commissions of inquiry with the arbitration jurisdiction. On the contrary, it desires to distinguish clearly between these two absolutely different institutions. If reference is made in the Russian text to the establishment of the responsibilities, it is because these responsibilities must result logically from the impartial exposition of the circumstances of fact presented by the commissions of inquiry to the Governments. Once more, these commissions are but examining judges. It is incumbent upon the Governments to draw the consequences from their reports.

His Excellency Mr. MARTENS is ready, at all events, to withdraw his amendment, if the committee believes that its adoption might give rise to misunderstandings.

The **President** states that, if he has well grasped the thought of Mr. MARTENS, the examination of the facts with which the Commission is to proceed, shall furnish the source of the responsibilities.

His Excellency Sir **Edward Fry** insists that the discussion shall not end by confusing absolutely and necessarily distinct questions: the question of fact on the one hand, and the question of right or of morality on the other hand.

Mr. **Kriege,** as well as Mr. **James Brown Scott** and his Excellency Mr. **Mérey von Kapos-Mére,** approve of the observations of his Excellency Sir EDWARD FRY.

Mr. **Fromageot** remarks along the same line of discussion, that some conflicts will arise without there being any need of attempting to fix the responsibilities, and if these responsibilities do not exist, what reason is there to urge the commissioners to deal with them; this may become a source of new difficulties.

His Excellency Mr. **Martens** repeats that he does not insist, in view of the fact that he is unable to modify the judgment of his colleagues.

Under these circumstances, the **President** declares that there is unanimous agreement of the committee for the retention of Article 9.

The discussion having been exhausted, Article 9 is retained with the sole addition of these words "*and desirable.*"

The meeting is brought to a close.

SECOND MEETING

JULY 16, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5 o'clock.

The minutes of the first meeting are adopted.

The **President** grants the floor to his Excellency Baron GUILLAUME in order to communicate to the committee that part of the report relative to the reservations of his Excellency Mr. MARTENS concerning the retention of the old text of Article 9.

The **Reporter** reads it aloud.

His Excellency Mr. **Martens** approves the text of the reporter, and the **President** declares that the committee is agreed as to the adoption of Article 1 of the Franco-British project.[1]

Mr. **Heinrich Lammasch** would have the authors of this project state if the modification in the text which he notices in its first article (neither honor nor essential interests instead of the words neither honor nor *some* essential interests) results from a typographical error, or if the change is intentional?

In answer to this question, it is stated that this is a typographical error which will be corrected.

The discussion of the articles of the Convention is then continued.

Mr. **Fromageot** reads aloud Article 10 and the Russian,[2] the Italian,[3] the Netherland [4] and the Franco-British [1] propositions which relate thereto.

ARTICLE 10

The international commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined and the extent of the powers of the commissioners.

It settles the procedure.

At the inquiry both sides must be heard.

The form and the periods to be observed, if not stated in the inquiry convention, are decided by the commission itself.

[384] Mr. **Fromageot** then develops the ideas which guided the authors of Article 2 of the Franco-British project.

Paragraph I of this article reproduces the corresponding paragraph of Article 10 of the Convention of 1899.

[1] Annex 7.
[2] Annex 2.
[3] Annex 3.
[4] Annex 4.

The object of the text of paragraph II is to call to the attention of the States signing a *compromis,* some technical points which it is expedient to foresee.

Such, among others, is, for instance, the matter of the part played by the assessors: shall they have access to the quarters of the council of the commission of inquiry, shall they have the right to vote, shall they, in short, take part in all the operations of the inquiry?

Such, again, are the questions of the mode and period of formation, of the period for the deposit of the expositions of fact that the parties might wish to present.

His Excellency Sir **Edward Fry** shares the view expressed by Mr. FROMAGEOT.

The **President** declares that the adoption of paragraph I of Article 2 of the Franco-British proposition presents no difficulty whatever. The Russian proposition itself differs from it by only a slightly different text. (*Approval.*)

As to paragraph II, Mr. FROMAGEOT and his Excellency Sir EDWARD FRY have just reported the considerations which led the French and English delegations to give precision to certain points which it is necessary to foresee in the *compromis.*

Mr. **Heinrich Lammasch** wishes to know if it is necessary to mention the assessors.

He remarks that according to the text of this paragraph II, it seems that the presence of the assessors should be the normal condition.

He has some doubts, however, as to the real rôle of the assessors which will depend on the circles from which they have been chosen.

If the commission is composed of jurists, the assessors will be experts. If, on the contrary, it is composed of specialists, they will be jurists as in the Hull incident when it was composed of admirals.

In the latter hypothesis, the assessors will not fail to exercise, but without responsibility, great influence upon the decisions of the committee.

This presents a certain danger, and Mr. LAMMASCH believes that it would be more logical, in such case, to grant them not a deliberative, but an effective voice, that is to say, to appoint them members of the commission.

Mr. HEINRICH LAMMASCH concludes, therefore, that the appointment of the assessors should be exceptional, and he proposes to include such reference as has been made to them in a new paragraph III to be added to Article 2.

His Excellency Mr. **Martens** offers some general remarks.

In his judgment, the great difficulty of the Convention of 1899 lay in the absence of rules of procedure.

The Franco-British project goes to the other extreme in presenting to the parties in litigation twenty-seven articles, that is to say, a veritable code.

Is it not striking to realize that the Convention of 1899 adopted not more than two or three rules of procedure for arbitration, whilst we are elaborating a code for the commissions of inquiry which are not even either court or tribunal?

Coming to the matter of assessors, his Excellency Mr. MARTENS believes that the Convention should deal only with the commissioners and leave to the parties in controversy full freedom with regard to the appointment of agents, assessors, counselors or pleaders.

The committee of examination would facilitate the recourse to the inter-

national commissions of inquiry in not overburdening the Convention with useless elements.

[385] His Excellency Sir **Edward Fry** observes that Article 3 of the project under discussion meets the misgivings of Mr. MARTENS. In no way does it impose obligatory machinery, but it gathers in advance, at the disposal of the Governments, some optional rules, provided that the parties have not agreed to adopt others with regard to the assessors. His Excellency Sir EDWARD FRY calls the attention of Mr. MARTENS to the words *"if necessary,"* contained in Article 2.

The experience of the Paris commission has proven that all this machinery was necessary; let us make the most of it; it is not an obligation which we impose, but a service which we render, instead of absolute freedom so that the Commission must foresee all; let us rid it of this work by making provision for it.

The **President** believes that, no doubt, full satisfaction would be given Mr. MARTENS by the adoption of the amendment of Mr. LAMMASCH.

After an exchange of views in regard to this matter between his Excellency Sir **Edward Fry,** Mr. **Fromageot,** and his Excellency Mr. **Martens,**

Mr. **Heinrich Lammasch** reads aloud his amendment which consists in the suppression in paragraph II of Article 2 of the Franco-British proposition of the words *"as well as the designation of the assessors, if there are any"*—and their mention in the following clause—and in the addition to this article of a new paragraph III, reading as follows:

> If the Powers deem it necessary to appoint assessors, the convention of inquiry shall likewise determine the mode of designation of these assessors and the scope of their powers.

As the result of a remark by Mr. FROMAGEOT the word *"Parties"* is substituted for that of *"Powers."*

Mr. **Guido Fusinato** approves of the remarks made by his Excellency Mr. MARTENS and finds that as to the points of procedure the project is too detailed.

Furthermore, he fears that the text of the project might give to these rules at least the appearance of an obligatory nature every time a special convention might not expressly have derogated therefrom.

In such case great danger would be met with, the danger of seeing one of the parties attacking the report as null and void on the basis of the violation of one of these too numerous rules of procedure.

Therefore, it seems to him wiser to establish clearly their nature of mere recommendation in conformity with the provisions of the Italian amendment.[1]

The **President** points out to Mr. GUIDO FUSINATO that since these remarks more directly concern Article 3, the adoption of Article 2 would in no way interfere with the adoption of the Italian amendment.

His Excellency Mr. **Mérey von Kapos-Mére** is of opinion that the question dealing with the languages had better be treated of in Article 2 than in a special article. The Governments will more easily agree upon this point than the Commission itself would. He proposes that the determination of the language to be used be inscribed in the convention of inquiry.

Messrs. **Kriege** and **James Brown Scott** support the motion of his Excellency Mr. MÉREY VON KAPOS-MÉRE.

[1] Annex 3.

Mr. **Fromageot** advocates the opposite point of view. He calls the attention of the committee to the fact that the commissioners might be designated after the designation of the language, or that a change might be made in their choice.

The danger of the proposition of his Excellency Mr. Mérey von Kapos-Mére would be to force upon a commissioner a language that he might
[386] perhaps know but imperfectly or not at all.

The essential matter is that the commissioners should understand, but we are running the danger of imposing upon them a language that they may not understand and of preventing them from choosing the language which they might understand.

His Excellency Mr. **Mérey von Kapos-Mére** admits the force of the argument of Mr. Fromageot. It seems to him, however, that in his proposition the choice of the language will exert an influence upon the choice of the commissioners. On the contrary, in the opposite system, there is reason to fear that the majority of the commissioners may impose a language upon the minority.

As a result of his personal experience in the Venezuelan and Muscate arbitrations, Mr. **Heinrich Lammasch** fears that the commissioners may be reproached for or suspected of partiality, if the responsibility of choosing between several languages is left to them. Free them from this embarrassment and from this danger.

His Excellency Mr. **Martens**, in his capacity as arbitrator, has also been able to realize that when the matter of languages had been foreseen in the *compromis*, everything went along as well as could be wished; in the contrary case, great difficulties were encountered.

In his judgment, these practical considerations have even greater weight for the commissions of inquiry which are expected to be able to come together without delay.

The **President** points out one objection to the committee: the commissioners will always have the means of settling a conflict between themselves by a majority vote; their conflict can hardly become of a rankling nature, whilst two Governments are very differently embarrassed. Who is to harmonize them and which of them will be the first to yield at a moment when it is most essential for them to rid themselves as soon as possible of a burning question? Is it not imprudent on the pretext of ridding the commission of an embarrassing situation, to prevent or to delay the appointment of such a commission?

His Excellency Mr. **Mérey von Kapos-Mére** observes that these *pourparlers* will not be known to public opinion, whilst a disagreement between the commissioners will unfortunately be of a more manifest nature.

His Excellency Baron **Guillaume** is of the opinion that one might conciliate the divers considerations expounded by the members of the committee, by wording the article in such a way that it will express only the *wish* of having the Governments decide the matter of languages. For want of such action, this matter would then be settled by the commission itself.

The **President** suggests the following wording:

> In case the convention of inquiry should not have determined as to the choice of languages, the commission will decide this matter.

Mr. **Guido Fusinato** is of the opinion that if mention is made of the languages in Article 2, it would constitute a recommendation of great importance.

Mr. **Kriege** observes in connection with this matter that such an insertion would impart an obligatory nature to the provision and would be in contradiction with Article 7.

Mr. **Guido Fusinato** answers by saying that the mention of the languages would be found in the same place as the provision relative to the seat of the tribunal to which reference is also made in Article 2.

[387] After an exchange of views in reference to this matter, the **President** finds that the committee is agreed upon the following points:

The Convention *recommends* to the two Governments to reach an understanding as to the choice of languages.

In case this matter of languages is not mentioned in the *compromis*, the commission itself shall decide.

Mr. **Fromageot** then takes up the question of the exposition of facts. He sets forth the necessity of the optional nature of these expositions which may at times be prejudicial and at other times very useful. It is well that in the latter case, the *compromis* should fix the period within which they must be presented.

Mr. **Guido Fusinato** asks if there is not confusion between the first part and the second part of paragraph II of Article 2.

In the first we read of "stating the facts with precision," and in the second, on the other hand, of an "exposition of the facts."

His Excellency Mr. **Martens** believes that the presentation of expositions of the facts before the functioning of the commission would be prejudicial.

His Excellency Sir **Edward Fry** states that Article 2 may be divided into two distinct parts of which one is obligatory and the other optional.

The **President** proposes that these two parts be set into two distinct paragraphs.

Mr. **Fromageot** adds that such a division would have the further advantage of not departing, in its first part, from the text of 1899.

The **President** reads aloud the following wording:

> The inquiry convention defines the facts to be examined, the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.
>
> It also determines, if need there be, the place where the commission shall meet, the power to remove to another place, the language which shall be used, the date for the deposit of the statements of facts which the Parties should have to present, and generally speaking, all the conditions upon which the Parties have agreed.
>
> If the Parties deem it necessary to appoint assessors, the inquiry convention shall also determine the mode of designation of these assessors and the extent of their powers.

After an exchange of views, the committee decides that Articles 6 and 7 shall be transferred after Article 2 and form Article 3.

The **President** then reads aloud the Italian proposition.

Mr. **Guido Fusinato** insists upon his desire to have Article 8 of the Franco-British project omitted and to have the Italian amendment to Article 2 adopted.[1]

[1] Annex 3.

He believes that this precaution would remove all fear of an action in annulment.

Mr. **Fromageot** states that Article 8 but repeats the first article of the regulation concerning arbitral procedure.

He believes that he has met, in advance, the wishes of all by the addition of the words: *"in so far as the parties do not agree upon other rules."*

The **President** observes that the fear of an action in annulment may always persist, that pleaders of bad faith may avail themselves of the violation of rules of procedure established by the commission itself as well as by the Convention.

[388] His Excellency Baron **Guillaume** proposes to replace in Article 3 of the Franco-British project the words "have adopted the rules" by "have recommended." Nothing would be more simple and more clear.

Mr. **Kriege** supports the modified reading of Article 3 of the Franco-British proposition.

After a remark by his Excellency Mr. **Martens** who distinguishes three grades in the dispositions of procedure, those of the general convention, those of the convention of inquiry and those of the commission itself, the Italian proposition is put to a vote and rejected.

Voting for: His Excellency Mr. RUY BARBOSA, his Excellency Mr. MARTENS and Mr. GUIDO FUSINATO.

Voting against: the PRESIDENT, Messrs. JAMES BROWN SCOTT, KRIEGE, his Excellency SIR EDWARD FRY, his Excellency Mr. MÉREY VON KAPOS-MÉRE, Mr. HEINRICH LAMMASCH and his Excellency Baron GUILLAUME.

Abstaining: His Excellency Mr. ALBERTO D'OLIVEIRA.

In consequence, the text of Article 3 of the Franco-British proposition[1] is retained.

The next meeting is fixed for Saturday forenoon, July 20, for the continuation of the examination of the modifications proposed to the text of Part III.

The meeting is brought to a close at 6:30 o'clock.

[1] Annex 7.

THIRD MEETING

JULY 20, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10 o'clock.

The minutes of the second meeting are adopted.

The **President** reads aloud the new Article 2 of the Franco-British proposition:[1]

> International commissions of inquiry are constituted by special agreement between the parties in dispute.
>
> The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.
>
> It shall likewise determine, if need there be, the place where the commission shall meet, the power to remove to another place, the language which shall be used, as well as the date on which each Party shall deposit its statement of facts, and generally speaking, all the conditions upon which the Parties have agreed.
>
> If the Parties deem it necessary to appoint assessors, the inquiry convention shall determine the mode of their designation and the extent of their powers.

He then reads the new Article 3.

> In case the inquiry convention should not have determined where the commission is to sit, it shall sit at The Hague.
>
> The place of sitting, once fixed, cannot be altered by the commission except with the consent of the parties.
>
> The commission decides likewise, if necessary, the choice of languages of which it shall make use and the use of which before it shall be authorized.

Mr. **Kriege** proposes to replace the words of Article 2: "*Where the commission shall meet*" by the expression "*where the commission is to sit*" which is found in Article 3. It seems to him more juridical to use identical terms in these two articles.

This proposition is adopted.

The **President,** after an exchange of views, proposes the following wording for the first lines of the new Article 3:

> In case the inquiry convention should not have determined where the commission is to sit, it shall sit at The Hague.

[1] Annex 7.

[390] Mr. **Fromageot** notices that the new Article 3 does not mention the power for the commission to transfer its seat in the course of the pleadings and momentarily, in order soon thereafter to return again, as a matter of course, to the place indicated in the manner determined by this article.

The **President** answers that this question will be treated elsewhere in a separate article, and for the moment he feels that the committee has come to an agreement as to the rules to be established in regard to the determination of the seat of the commission.

He then requests the members to express their views with regard to the matter to which Mr. FROMAGEOT has just called attention: in what conditions will it be proper to grant power to the commission of inquiry momentarily to transfer its seat to another place than the one that has been designated?

Mr. **Kriege** is of opinion that the international commissions of inquiry should have freedom to transfer their seat, but he adds that it seems necessary, in order to move to the territory of a third Power, for the commission to first obtain permission.

His Excellency Sir **Edward Fry** supports this observation.

The **President** thinks that it is indeed necessary to be very prudent in the wording of this article.

He fears that a commission of inquiry might frequently lightly avail itself of the right which might be granted to it to betake itself to the place of the incident. A great stir might still prevail there for weeks following the facts which it is the mission of the commission to determine, and the appearance of the commissioners—whom public opinion will already too easily look upon as judges—might very unfortunately occasion an invigoration of the popular passions.

Therefore, the PRESIDENT proposes to subject the power of transfer to two conditions:

The first, already mentioned by Mr. KRIEGE, concerns the permission of the territorial Government. The other would be the previous consent of the parties in controversy.

His Excellency Sir **Edward Fry** would be quite prepared to entrust the care of deciding as to the desirability of the transfer to the commissioners themselves, in order to afford them all the facilities for the establishment of the truth.

The **President** would desire likewise that this might be so, but upon the condition that this provision might not prove dangerous.

Mr. **Guido Fusinato** agrees with the opinion of Mr. KRIEGE and would have the committee state if it means to grant permission to the commissioners to address themselves to the Government of the third Power, or if they shall do so through the medium of the parties in controversy.

His Excellency Mr. **Asser** and Mr. **Heinrich Lammasch** believe that it is possible and even useful to confer upon the commission the right to address itself directly to the third Power.

Mr. **Guido Fusinato** calls their attention to the fact that this solution would in fact do away with the second condition demanded by the President.

His Excellency Baron **Guillaume** and Mr. **Guido Fusinato** inquire what the commission would be expected to do in case one of the interested States were to object.

Mr. **Kriege** and his Excellency Sir **Edward Fry** think there would be nothing else left to them to do except to give up their plan.

Upon the suggestion of his Excellency Sir **Edward Fry**, the following text is adopted:

The commission has the power, with the consent of the Parties in [391] controversy and with the permission of the State in which are situated the places in litigation, to transfer itself momentarily to those places, if it is not domiciled there, or to delegate to those places one or several of its members.

The committee then passes on to Article 11 of the Convention of 1899 and to the various propositions relating thereto.

ARTICLE 11

International commissions of inquiry are formed, unless otherwise stipulated, in the manner determined by Article 32 of the present Convention.

Mr. **Fromageot** reads aloud the text of Article 4 of the Franco-British project,[1] reading as follows:

Unless otherwise stipulated, commissions of inquiry are formed in the manner determined by Articles 32 and 34 of the present Convention.

Mr. FROMAGEOT states that the French and English delegations had thought of happily completing the wording of Article 11 of the Convention of 1899 by also mentioning therein the rules to be followed with regard to the presidency.

This addition is adopted.

Mr. FROMAGEOT then proceeds to the reading aloud of Article 5 of the Franco-British proposition:

In case of the death, retirement or disability from any cause of one of the commissioners or assessors, his place is filled in the same way as he was appointed.

He recalls that the hypothesis has come up in practice without, furthermore, giving rise to any difficulties; but he believes that it would be well to make provision for it as Article 35 of the Convention of 1899 has done for arbitrational matters.

Upon a remark by Mr. **Heinrich Lammasch**, who calls attention to the wording of Article 2 already adopted, the words *" or one of the assessors, should there be any "* are inserted after the word *" commissioners "* and the provision is adopted.

There is then taken up the reading of Article 12 of the Russian proposition[2] and Article 9 of the Franco-British project, worded as follows:

ARTICLE 12 (Russian). Each party shall be represented before the commission by an agent who shall act as intermediary between it and the Government which has named him.

[1] Annex 7.
[2] Annex 2.

The appointment of the counselors for the defense of their interests is left to the judgment of the parties.

Article 9 (Franco-British project):

The parties are entitled to appoint delegates or special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to defend their rights and interests before the commission.

The commission as well as the adverse party should be notified of the names of the agents and counsel designated by each party.

Mr. **Fromageot** states that the article of the Franco-British proposition had been suggested by Article 37 of the arbitration convention.

Furthermore, he calls attention to the fact that at the time of the meeting of the Hull commission, there was some uncertainty as to the rôle of the agents. It would doubtlessly be well to specify that the agent is the representative of his Government before the commission.

[392] His Excellency Mr. **Martens** notes that there is agreement as to the central thought of the Russian and Franco-British propositions.

He insists upon the important part of the agents before the commission of inquiry—whilst the employment of counselors or of pleaders, is not indispensable and must be left to the untrammeled judgment of the parties.

Mr. **Fromageot** sees more than a difference of form between the two propositions—on the contrary, he sets forth clearly the more imperative nature of the Russian wording.

His Excellency Mr. **Martens,** in agreement with the French and English delegations as regards the optional nature of the provision, accepts their wording.

Mr. **Heinrich Lammasch** would, in the French article omit the word "*defend.*" He deems it preferable to avoid the use of this expression, which, according to him, always implies the idea of a claim or of a reparation demanded by one party from the other.

Mr. **Fromageot** believes that this word—which in the French language in no way prejudges the fairness of a demand—indicates a situation of fact which always arises. Necessarily, in an international conflict, each party in controversy will claim or defend that which it believes to be its "*right.*"

After an exchange of views upon the matter, the committee modifies the wording of the article; in the place of the words "*to defend their rights and interests,*" are put these other words "*to state their case and uphold their appraisals.*"

The committee passes to the discussion of Article 13, paragraph 1, of the Russian proposition, which reads as follows:

The commission shall be formed within two weeks after the date of the incident which caused its formation.

His Excellency Mr. **Martens** states that Article 13 of the Russian proposition [1] is intended to hasten the meeting of the commission of inquiry.

He believes it expedient to incorporate into the Hague Convention the provision requesting the Governments to act within the shortest possible period of time.

[1] Annex 2.

Their Excellencies Mr. **Asser** and Mr. **Léon Bourgeois** believe that it would be difficult to put an absolute period into the Convention: what would follow in case the two weeks had elapsed and no action had as yet been taken?

His Excellency Sir **Edward Fry** agrees to this view and observes that Article 9 recommends the constitution of a commission of inquiry only when the diplomatic negotiations shall have failed; and is not the chancelleries' wise way, of proceeding slowly, proverbial?

His Excellency Mr. **Martens** declares that it was not at all his intention to impose an absolute period; however, he deems it well to insert in the Convention words which will tend to have an efficacious effect upon the activity of the chancelleries.

The committee pronounces against the insertion of a provision of this nature and adopts Article 10 of the Franco-British proposition.

The assembly then takes up the examination of Article 11 of the Franco-British proposition, which reads as follows:

> If the commission meets elsewhere than at The Hague a secretary general, acting as registrar for the Commission, shall be named by it.
> [393] It is the function of the registry, under the control of the president to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and for the custody of the archives while the inquiry lasts.
> He provides the necessary stenographers and translators.

His Excellency Mr. **Asser** proposes a simpler wording in the first paragraph: "*. . . it appoints a Secretary whose office serves as registry.*" Then he demands the omission of the third paragraph.

The modification of the wording of the first paragraph is accepted.

Upon a suggestion by Mr. **Heinrich Lammasch** who proposes that the archives of all the commissions of inquiry be brought together at The Hague, the committee words the last phrase of Article 2 as follows:

> And while the inquiry lasts, for the custody of the archives, which shall be subsequently transferred to the International Bureau at The Hague.

Mr. **Fromageot** remarks that the appointment of official stenographers and translators by the recorder would assure their greater impartiality, and that this is the reason for the proposed provision.

The **President** believes, nevertheless, that it would be more conformable with equity to leave it to each agent, or to each party, to bring their own stenographers. If their reports do not agree the commission, no doubt, will have the right to decide.

After an exchange of views upon this matter, the committee decides to omit the third paragraph.

The articles of the Franco-British propositions relative to the procedure are then taken up.

The **President** states that this time it is the Russian project which is more explicit and detailed; Article 14 of this project is longer than the corresponding Article 8 of the other project.

His Excellency Mr. **Martens** declares that there is a mistake; Article 14 of the Russian project contains, all by itself, all the rules of procedure, whilst in the other proposition the French and English delegations have, in reality, devoted Articles 8 to 27 thereto.

Mr. **Fromageot** calls attention to the fact that at Paris, in 1905, in the Hull

commission, much time had been wasted in painfully elaborating a regulation of procedure.

The French delegation has desired to avoid the repetition of these gropings; therefore it has deemed it useful to enter somewhat into details.

Mr. FROMAGEOT declares, furthermore, that the rules specified in the project which he supports, are not intended for a special case, but are applicable in all circumstances, and that their insertion in this Convention will render service to the chancelleries and to the commissions by freeing them from the necessity of hastily deciding questions of principle in delicate moments.

In order to give satisfaction to the wish expressed by the representative of the Italian delegation and to emphasize the optional nature of the article under discussion, Mr. FROMAGEOT proposes that the committee place it after Article 3, in which the words *"have adopted"* have already been replaced by the expression *"recommend."*

This proposition is adopted.

His Excellency Mr. **Martens** having withdrawn Article 14 of the Russian project, the committee adopts Article 13 of the Franco-British project which it takes as the basis for its discussion.

[394] The committee then takes up the study of Article 18, reading as follows:

> The witnesses are subpœnaed on the request of the parties or by the commission of its own motion.
>
> They are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.
>
> No witness can be heard more than once upon the same facts, if it is not for the purpose of being confronted by another witness whose statement would contradict his own.

His Excellency Mr. **Asser** calls for the omission of the last paragraph of this article.

Mr. **Fromageot** calls the attention of the committee to the danger of two successive depositions of the same witness relative to one and the same question. He fears that the witness in the interval between his two depositions might be affected by external influences.

The committee believes, however, that full freedom, in this respect, should be left to the commission, and it omits the last paragraph of Article 18.

Mr. **Kriege** begins an examination of the means put at the disposal of the commissions of inquiry to compel the witnesses to appear.

He declares, in the first place, that the Commission itself has no coercive and threatening means at its disposal to make sure of the appearance of a witness, but that it will always have to resort to the good will of the Government within whose territory the witness is domiciled.

In the next place, he realizes the obligation for the parties which have signed a *compromis* to take all necessary measures to insure the appearance of the witnesses domiciled within their territory.

But, in considering the hypothesis where the witnesses might find themselves within the territory of a third Power signatory of the Convention, Dr. KRIEGE would only demand of such Power the obligation of having the witnesses examined by its competent authorities, under the reservation, however, that the requested hearing of witnesses may not be prejudicial to the security or to the sovereignty of such Power.

The **President** shares his view with regard to the second point. He believes also that the parties which have signed a convention of inquiry, have, by that fact, obligated themselves unreservedly to furnish to the commission the means of establishing the truth.

His Excellency Mr. **Martens** distinguishes two hypotheses.

When the witnesses are subjects of the States in controversy signatories of the *compromis,* such States are morally and juridically obligated to insure their appearance.

When, on the contrary, they are subjects of a third Power, the commission shall have to address itself to the latter through the medium of the agents of the parties in controversy.

The **President** believes that this solution is dangerous.

One of the parties may indeed, be interested in preventing the deposition of a witness. Would it not be better to permit the president of the commission to address himself directly to the Government of the third Power?

After an exchange of views upon this matter between his Excellency Baron **Guillaume,** his Excellency Mr. **Martens,** Mr. **Kriege,** his Excellency Mr. **Asser** and his Excellency Sir **Edward Fry,** an agreement is reached in the committee to the effect that the commission shall be entitled to address itself to the Government of the State within whose territory it is meeting for the appearance of witnesses, established within the territory of the third Power.

The **President** proposes to charge Baron GUILLAUME, Messrs. KRIEGE and FROMAGEOT with the wording, during the recess of the committee, of the article along the lines indicated.

[395] Mr. **Asser** calls for the omission of the second paragraph of Article 16 of the Franco-British project, worded as follows:

> To ensure the summoning of witnesses or experts or the hearing of their testimony if they are unable to appear before the commission, each of the contracting parties, at the request of the commission, will lend its assistance and arrange for their evidence to be taken before the qualified officials of their own country.

This proposition is not adopted.

Upon a remark made by Mr. FROMAGEOT, Mr. **Kriege** repeats that he is of the opinion that the parties in controversy signatories of the convention of inquiry are obligated to insure the personal appearance of the witnesses.

Mr. **Fromageot** calls the attention of the committee to the importance of this obligation and fears that the committee is departing from the rules followed in 1899, as they have been explained in the report relative to Article 12 of the Convention now in force.

Mr. **Guido Fusinato** proposes to replace the words "*contracting parties*" by the words "*signatory Powers.*"

He then remarks that the rogatory commissions may have for their object not merely the deposition of witnesses, but even the communication of documents, information, etc.

He requests that this should be borne in mind when the article is drafted.

The **President** declares that this shall be done, and closes the meeting at 11:40 o'clock.

[396]

FOURTH MEETING

JULY 23, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting is opened at 5 : 15 o'clock.

His Excellency Mr. **Alberto d'Oliveira** requests the floor in order to refer to the minutes of the last meeting.

He calls the attention of the committee to the exchange of views referred to in those minutes in terms which might seem to imply an abandonment of the reservations made in 1899 to Article 12.

ARTICLE 12

The Powers in dispute undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

He recalls the fact that at the time of the First Conference, Messrs. HOLLS, ZORN and Baron D'ESTOURNELLES DE CONSTANT had pointed out the danger of a too absolute wording of this article, and that upon the proposal of Chevalier DESCAMPS the following words were added: "*as fully as they may think possible.*"

Mr. ALBERTO D'OLIVEIRA believes that this reservation is still useful and demands its retention.

The minutes are adopted.

The **President** requests Mr. FROMAGEOT to give some explanations to the committee with regard to the work of the wording of a certain article with which he, as well as his Excellency Baron GUILLAUME and Mr. KRIEGE had been charged.

Mr. **Fromageot** reads aloud the text of the new Article 23 (Article 16 of the Franco-British project).[1]

ARTICLE 23 (*new*)

The Powers in dispute undertake to supply the commission of inquiry,
[397] as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

They undertake to make use of the means at their disposal under their municipal law, to ensure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission,

[1] Annex 7.

the parties shall arrange for their evidence to be taken before the qualified officials of their own country.

Mr. FROMAGEOT explains that in the wording of this article, his colleagues and himself, in spite of their desire to illuminate the inquiry in a large sense, thought they should not impose upon the Governments an absolute obligation to furnish all means of proof: a commission might abuse this obligation and carry its curiosity beyond the necessary limits; this is an abuse and a danger which must be prevented. They have, therefore, retained the reservations of 1899.

As regards the witnesses, the States must obligate themselves to do all within their power in order to insure their appearance and their hearing by conforming to their municipal legislation.

Mr. FROMAGEOT then passes on to Article 24.

ARTICLE 24

For all notifications which the commission has to make in the territory of a third Power signatory to this Convention, the commission shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests cannot be refused unless the Power in question considers them of a nature to impair its sovereign rights or its safety.

The commission will also be always entitled to act through the Power in whose territory it sits.

Mr. FROMAGEOT observes that his colleagues and himself have preferred for this article the word *"notification"* to *"summons,"* which is stronger than the former and seems to imply the exercise of a sovereign authority.

The second paragraph reproduces the formula of the conventions of international private law in reference to the rogatory commissions; it is inserted at the request of Mr. KRIEGE, who has pointed out the expediency of employing an expression already approved and agreed to.

The commission of inquiry will, therefore, have the choice of addressing itself to the Government of the third Power, either directly or through the intermediary of the Government of the country within which it is sitting. And it will be likewise for the establishment of any other means of proof. In any case, it is not prudent to leave a citizen free to testify without the authorization of his Government. The Government can not refuse this authorization without appealing to its right of sovereignty or to the interests of its security.

Mr. **Guido Fusinato** again referring to Article 23, remarks that he has in view only those nationals under the jurisdiction of a party in controversy. He would know, however, if the obligation of the State to compel the witnesses to appear, is not the same with reference to residents who are not nationals of that State.

Messrs. **Fromageot** and **Kriege** answer this question in the affirmative and believe that the obligation formulated in the second paragraph exists even with regard to mere residents. There is no need to distinguish between them.

The committee is of opinion that that State has an authority over all those residing within its territory which permits it to compel them to appear.

[398] In his turn, Mr. **Heinrich Lammasch** puts a question to the committee.

Have the Powers that have signed an inquiry convention by that fact itself obligated themselves to release their employees from their professional secrecy? Such an obligation seems to result from the wording of Article 23, paragraph 2. Nevertheless, he believes it would be more prudent not to admit this while at the same time admitting that there are reasons pro and con with regard to the matter.

The **President** and Mr. **Fromageot** call attention to the fact that paragraph 2 of Article 23 refers to the municipal legislation of the States; they believe that in this matter the Governments must, with regard to the international Commissions, have the same freedom of appreciation as before their own tribunals.

His Excellency Baron **Guillaume** observes that Article 23 refers only to the "*appearance*" and not to the "*deposition*" of the witnesses.

His Excellency Mr. **Mérey von Kapos-Mére** believes that it is necessary to interpret the silence of the Convention with regard to the matter of professional secrecy in the sense indicated by the President.

This is the judgment of the committee. It shall be so recorded in the minutes.

Mr. **Fromageot** then reads Article 25 (*new*).

ARTICLE 25 (*new*)

The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

The term "*summoned*" [*appelés*] seemed preferable to "*cited*" which applies only when a sovereign authority enjoins a witness to appear; we are dealing here only with a call to appear.

Mr. FROMAGEOT draws the attention of the committee to the absence of the word "*experts*" in the second paragraph of Article 29.

It seems best to leave to the Commission freedom to permit experts to be present at the testimony of the witnesses.

The **President** rereads Articles 23, 24 and 25, which are adopted without any remarks.

After an exchange of views, the committee upon the motion of Mr. **Fromageot** decides to discuss, hereafter, article by article, the Franco-British project[1] beginning with Article 19:

The examination of witnesses is conducted by the president.

The members of the commission may, however, ask the witness questions which they consider proper to throw light upon or complete his evidence, or to inform themselves on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

[1] Annex 7.

His Excellency Sir **Edward Fry** is in favor of the English system of the direct interrogation of witnesses by the agents and the counselors themselves.

[399] Mr. **James Brown Scott** is of the same opinion.

Mr. **Heinrich Lammasch** believes, however, that it is proper in this matter to bear in mind the customs and the juridical methods of each nation. We have two very different methods before us. A goodly number of countries are in no way prepared to accept the system of "cross-examination."

In support of this observation, the **President** expresses the opinion that it would but little embarrass an Anglo-Saxon witness if interrupted only by the president of a commission of inquiry, whilst a French, Austrian or German witness might be greatly disconcerted in having to answer questions put to him directly by a pleader.

His Excellency Sir **Edward Fry** does not insist upon the adoption of his national system.

His Excellency Mr. **Martens** would much desire that the summoning of witnesses were permitted only while the examination is actually under way. He distinguishes in this respect two phases in the labors of the commission of inquiry: the examination and the pleadings.

Mr. **Fromageot** answers this by saying that the entire procedure of the inquiry is but an examination, and that in his judgment, there is no need to distinguish between the inquiry and the pleadings, as is done in the case of arbitration.

The **President** supports the remark of Mr. FROMAGEOT. He also believes that the commission of inquiry is but an agency to secure information, still, in order to meet the wish expressed by his Excellency Mr. MARTENS, he proposes that the committee add in the text of Article 22 of the Franco-British project[1] the words "*the witnesses having been heard.*" (*Approval.*)

The committee returns to the discussion of Article 19. It is adopted along with Articles 20 and 21, worded as follows:

> ARTICLE 20. The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.
>
> ARTICLE 21. A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks well, which shall be recorded at the end of his statement.
>
> When the whole of his statement has been read to the witness, he is required to sign it.

Mr. **Fromageot**, before passing on to Article 22, would ask if it is not possible to discuss and to assign first of all, a place to Article 17 and the rest of the reserved articles.

The committee accepts this suggestion and passes on to Article 17 of the Franco-British project.

> ARTICLE 17. The agents are authorized in the course of or at the close of the inquiry, to present in writing to the commission and to the other party

[1] Annex 7.

such statements, requisitions, or conclusions as they consider useful for ascertaining the truth.

His Excellency Baron **Guillaume** fears that the adoption of the word "*conclusions*," which usually means "requests made of the judges by the pleaders," may arouse suspicion of an encroachment on the part of the commission of inquiry upon the field of arbitration.

Mr. **Fromageot** remarks that the word "*conclusions*" may be used in several different meanings. Sometimes it refers to requests made of the inquiring commissioners by the parties in order to secure a decision upon this or
[400] that matter, as for instance, a transfer to the places where the events in question took place; at other times, conclusions simply mean summaries of the inquiry made by the parties from their respective points of view.

His Excellency Baron **Guillaume** insists, nevertheless, upon the use of another term of fewer different meanings, and proposes the expression "*summaries of facts.*"

This proposition is accepted.

His Excellency Mr. **Martens** believes that it would be well to modify the wording of Article 17 in order to emphasize the fact that the pleadings are not necessary before the commissions of inquiry.

An exchange of views upon this matter follows, with the result that the proposed wording has for its object to emphasize the differences between the operation of the commission which does not necessarily include pleadings, and arbitration. Nevertheless, upon a motion of the **President**, the minutes and the report shall note the remark of his Excellency Mr. MARTENS.

Articles 17 and 23 are adopted.

Before resuming the successive continuation of the articles, the committee passes on to Article 12, which, relative to publicity, had been held in reservation.

> ARTICLE 12. The sittings of the commission are not public, nor the minutes and documents connected with the inquiry published, except by virtue of a decision of the commission taken with the consent of the parties.

Mr. **Fromageot** explains that the idea which controlled the authors of this article is of a practical nature.

The principle of non-publicity is a principle of prudence and a necessary precaution. Publicity may sometimes be embarrassing to the witnesses. At all events, it will always be a more easy matter for the commission to decide, if necessary, upon the publicity of the pleadings than to order the doors closed, which is frequently a delicate measure to take and ill understood by the public.

Article 12 is adopted, as well as Article 14, worded as follows:

> ARTICLE 14. Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

Article 15 is then taken up.

> ARTICLE 15. The commission is entitled to ask from either party such explanations and information as it considers necessary. In case of refusal the commission takes note thereof.

His Excellency Mr. **Alberto d'Oliveira** believes this provision useless in view of Article 16 of the Franco-British project (which has become the new Article 23).

Mr. **Fromageot** believes, on the contrary, that it is desirable to give to the Commission a text which may, if need be, permit it to request certain supplementary proofs from the parties.

After some discussion, the committee decides that it is useless to provide for the case of refusal, and resolves to omit the last phrase of Article 15.

Several members, moreover, wonder if there was not some contradiction between the words "in case of refusal" and the obligation assumed by the parties in Article 16 (23).

[401] His Excellency Mr. **Mérey von Kapos-Mére** and Mr. **Heinrich Lammasch** propose to reverse the order of Articles 15 and 16.

It is proper to establish the obligation of the Powers to furnish to the commission all necessary proofs before citing the right of the latter to request new explanations.

Mr. **Fromageot** believes that Article 13 meets the observations made by the Austro-Hungarian representatives. It establishes the principle in this matter; the obligation for the parties to deposit at the beginning of the inquiry, their proofs, and, if necessary, their expositions of facts.

His Excellency Baron **Guillaume** remarks, on the other hand, that the proposition of his Excellency Mr. Mérey von Kapos-Mére would lead to the inconvenience of interrupting the series of the three articles adopted at the beginning of the meeting (Articles 23-25).

Article 15 is adopted with the omission of these words: "*in case of refusal, the Commission takes note thereof.*"

The committee passes on to the examination of the following articles which are adopted:

Article 24. The report of the international commission of inquiry is adopted by a majority vote and signed by all the members of the commission.

If one of the members refuses to sign, the fact is mentioned, the report being valid if adopted by a majority.

Article 25. The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is given to each party.

Article 26 (former Article 14). The report of the international commission of inquiry is limited to a finding of facts, and has in no way the character of an award. It leaves to the litigant Powers entire freedom as to the effect to be given to this finding.

Article 27. Each party pays its own expenses and an equal share of the expenses of the commission.

Mr. **James Brown Scott** declares that the delegation of the United States of America proposes the adoption of Article 17 of the Russian proposition[1] reading as follows:

Article 17. The Powers in litigation, having taken note of the statement of facts and responsibility pronounced by the international commission of inquiry, are free either to conclude a friendly settlement, or to resort to the Permanent Court of Arbitration at The Hague.

[1] Annex 2.

Mr. **Guido Fusinato** believes that the adoption of this article would mean the acceptance of the principle of obligatory arbitration. This prospect does in no way frighten him, but, if it is this which is to be voted, it should be clearly stated.

Mr. **Fromageot** thinks that if the committee desires to adopt this article, it should be placed, not at the end, but in a conspicuous place, for the commission of inquiry would thus become the first cog in a wheel ending in obligatory arbitration.

The **President** informs the committee of his fears of interfering, by this provision of the Russian project, with the frequent and very happy use of the commissions of inquiry.

[402] He fears that the Powers between whom a difference might rise might, in moments when it is expedient to act with great prudence and without constraint, shrink from the obligation of having recourse to arbitration, even before the facts had been clearly set forth.

The PRESIDENT is convinced, on the other hand, that after the publication of the report which shall set forth the truth, the parties will find themselves forced to abandon any hostile attitude and to settle their differences in a friendly manner. In short, this addition may do more harm than good.

His Excellency Mr. **Martens** is of opinion that, if two Powers agree to establish a commission of inquiry, they may go even farther in their manifestation of their devotion to peace.

The **President** insists upon the danger arising from the creation of a juridical obligation which might constitute an obstacle, and which might thus be less strong than the moral obligation resulting from the mere constitution of a commission of inquiry.

Mr. **James Brown Scott** does not insist upon the proposition.

The committee adopts Article 27 of the Franco-British project. It has thus finished the examination of all the modifications proposed to Part III of the Convention of 1899, concerning the commissions of inquiry.

The **President** requests his Excellency Baron GUILLAUME to be good enough to draft a report upon the conditions of this examination and proposes that the committee adjourn until this work is completed. (*Approval.*)

The meeting is closed at 7 o'clock.

[403]

FIFTH MEETING

AUGUST 3, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5 : 20 o'clock.

The minutes of the fourth meeting are adopted.

The **President** recalls the fact that in the meeting of July 27, 1907, the first subcommission of the First Commission decided to refer to the committee of examination the proposition of General PORTER and the propositions in reference to obligatory arbitration.

Afterwards, in order to complete the membership of the committee, it appointed the following members:

His Excellency Mr. HAMMARSKJÖLD.
His Excellency Mr. MILOVAN MILOVANOVITCH.
His Excellency Mr. DE LA BARRA.
His Excellency Mr. CARLIN.
His Excellency Mr. LUIS M. DRAGO.
His Excellency General PORTER.
Mr. LANGE.

The PRESIDENT enumerates the propositions submitted to the committee of examination, in accordance with a table which Mr. FROMAGEOT has been kind enough to prepare, beginning with the more general propositions and ending with those which seem more restrictive. (Annex to these minutes.)

It goes without saying that this table is not final and is merely intended to facilitate the work. On this basis it shall be printed and distributed. Mr. LAMMASCH offers thanks to Mr. FROMAGEOT in behalf of the committee.

His Excellency Mr. **Martens** states that the Hellenic delegation, in the meeting of July 18, expressed the desire that the committee of examination should also study the text of Article 10 in the form in which it was presented in 1899 to the Third Commission by its committee of examination.[1]

The committee decides that this article shall also be included in the table.

[404] His Excellency Mr. **Carlin** would know if it is proper to have the proposition of General PORTER included among those concerning obligatory arbitration.[2]

It does not establish any bilateral obligation; there is no arbitration obligation except for the party requesting it.

The **President** answers by saying that it is for this very reason that the American proposition was placed after those directed to obligatory arbitration.

[1] See Annex 68.
[2] See Annex 48.

His Excellency Mr. **Alberto d'Oliveira** reminds the committee of the declaration made by MARQUIS DE SOVERAL in the First Commission, in which he regarded the American proposition as the indubitable acceptance of the principle of obligatory arbitration upon one of the points enumerated in the list of the Portuguese proposition. It was for this reason that the Portuguese delegation voted for it; and Mr. D'OLIVEIRA has an impression that in the same meeting the French delegation presented an identical statement.

His Excellency Mr. **Mérey von Kapos-Mére** thinks that the difference between the proposition of the United States and that of Portugal is very simple.

The Portuguese proposition establishes a bilateral obligation, whilst the other imposes an obligation upon the creditors only.

After an exchange of views, the **President** suggests that the proposition of General PORTER should, without amplification, be put in a special paragraph.

The committee takes up the examination of the propositions relative to obligatory arbitration.

Following the order established in the prepared table, the **President** presents to the examination of the committee the Dominican proposition [1] directed to all kinds of differences without any restriction whatever.

His Excellency Mr. **Asser** observes that the Netherlands have concluded an unrestricted general arbitration treaty with Denmark, providing for the privilege for other States to adhere thereto. This Convention clearly establishes the attitude of the Netherlands with regard to obligatory arbitration. Still he is perfectly well aware that the present world situation does not yet permit of the hope that a general convention conceived in such wide terms will be signed.

He proposes, therefore, that the committee should not waste any time with the study of these propositions. (*Approval.*)

The **President** realizes, in consequence, that no member of the committee believes that any good would come from their discussing a proposition which would certainly be rejected by the Conference; he declares that the committee does not accept the principle of general obligatory arbitration without reservations.

The committee then passes on to the examination of the Brazilian proposition.[2]

The **President** reads this proposition aloud, and declares that its dominating character, as it results from the reading of Article 1, is the provision, without reservations, for obligatory arbitration.

His Excellency Mr. **Ruy Barbosa** declares, on the other hand, that its first article clearly establishes the freedom of the parties to have their dispute decided by any tribunal they may choose to that effect.

The **President** takes note of these words of his Excellency Mr. RUY BARBOSA, and desires to state once and for all that the words "*obligatory*
[405] *arbitration*" shall in no way imply recourse to this or to that tribunal; it is the principle of obligatory arbitration and not the character of the court which is now under discussion.

The freedom of the parties in this respect will, therefore, be ever absolute as to the choice of a court. (*Approval.*)

His Excellency Sir **Edward Fry**: The parties must be free to have recourse

[1] Annex 24.
[2] Annex 23.

either to the present court, or to the permanent court yet to be created, or to any other court.

Mr. **Heinrich Lammasch** makes the observation that the Brazilian proposition distinguishes itself and differs from the other propositions submitted to the committee from three points of view.

In the first place, it seems of a more extended nature than that of the other propositions by the application of the principle of obligatory arbitration to disputes of even a political character.

On the other hand, however, and by more numerous reservations than those inscribed elsewhere, it seems to take back with one hand what it grants with the other. In fact, besides the reservations of independence, of territorial integrity and of essential interests, the Brazilian proposition mentions the domestic institutions or laws of the States as well as the interests of third Powers. And in the third place, by an allusion to mediation and good offices, this proposition seems to combine the cases of arbitration and those cases in which good offices or mediation alone shall intervene, whilst the Act of 1899 reserves arbitration for disputes of a juridical nature while recommending good offices or mediation for conflicts of a political character.

Mr. LAMMASCH declares that this proposition, characterized as it was by him just now in a few words, would hardly obtain a favorable vote from the Austrian delegation. We will not be able to vote for it.

His Excellency Mr. **Ruy Barbosa** states that, in fact, his proposition does not clearly distinguish between questions of a purely juridical nature and those of a rather political nature. It seems to him, however, that if one views Article 1 of the proposition as a whole, this apparent confusion hardly seems to present inconveniences.

Article 1 proposes the principle of obligatory arbitration, but it establishes some reservations. Will not these latter suffice to remove all danger? From the moment when any difference whatever affects an essential interest such as, for instance, territorial integrity, the question whether it be of a political or juridical nature, must no longer be submitted to arbitration. If this is so, is it still felt that it is necessary to make a distinction?

As to the exceptions concerning the domestic institutions and laws, to which Mr. LAMMASCH alluded, are they not justified? Questions affecting these institutions come certainly not within the field of arbitration.

His Excellency Mr. RUY BARBOSA supposes, in illustration, a case which has been adjudicated finally; he feels convinced that the committee will be unanimous in admitting that the matter thus decided does not come within the field of arbitration; and this may be said to be equally true of cases awaiting the decisions of the courts in instances when, according to the institutions of the country these cases come within the private jurisdiction of the courts of justice.

Of course, he adds, authors cite the cases of denial of justice and except it. This, however, is a special matter, which, if necessary, must be decided between the Governments, but which can in no way be made the object of a general and obligatory arbitration treaty. No Government can provide for this case in a convention. It is absolutely repugnant to a Government to admit this hypothesis in the text of a treaty—and a gratuitous hypothesis at that—to lay this stain upon our judges.

Finally, in answer to this last remark made by Mr. LAMMASCH, Mr. RUY

Barbosa wonders what may be the reasons that are opposed to the exercise
[406] of mediation or good offices in questions of a juridical nature. And in this connection he recalls a dispute which, about a dozen years ago, had arisen between Brazil and Great Britain with regard to the island of Trinidad, and which was settled, thanks to the good offices of Portugal. Attention might likewise be called to the case of the Carolinas between Germany and Spain.

Once more, his Excellency Mr. Ruy Barbosa declares that he can see no reason for excluding this way of settling a difference, this conciliatory means of settling a matter.

The Brazilian Government would not renounce its right of first attempting the solution of any matter whatever by this means, which is as conciliatory, as pacific, and as useful as arbitration, and by far less costly and much swifter.

He cannot see how the friends of arbitration may place in its way obstacles such as this one, by subordinating its adoption to the clause of surrender of equally pacifying agents, and more commodious for the parties, and at the same time not less worthy nor less efficacious. What *will arbitration lose,* if besides it, we are to retain mediation and good offices, available at the good-will of the parties? Arbitration rejects only that which is in contradiction with it or to it. But in what manner can good offices or mediation ever prejudice or contradict arbitration?

His Excellency Mr. **Milovan Milovanovitch** presents, in his turn, a few observations. He suggests, in the first place, that the wording of Article 1 of the Brazilian proposition when compared with its Article 4, nullifies the obligation for the parties to have recourse to arbitration.

Returning once more to the exception of the municipal laws, he sets forth the arbitrariness and indecisiveness, in his judgment, of this reservation. Every Power interested in pursuing such a course might refuse the interpretation, through arbitration, of an international convention; it might allege a municipal law adopted even since the time of the conclusion of the Convention, which is to be interpreted by means of arbitration.

Passing on to Article 3, his Excellency Mr. Milovan Milovanovitch observes that the matters of change of sovereignty with regard to the populations and the plebiscitary theory connected therewith, are of a nature different from those which the committee has to study, and that it will be difficult to find a place for this article in an arbitration convention.

His Excellency Mr. Milovan Milovanovitch declares, in bringing his remarks to a close, that the Brazilian proposition, it seems to him, cannot serve as a basis for the discussion of a definitive project.

His Excellency Mr. **Martens** would merely remark that the wording of Article 1 of the Brazilian proposition is conceived in terms so restrictive that it excludes the most of the questions which have been the object of the fifty-five arbitral awards pronounced in the course of the nineteenth century. In support of this remark, he has pleasure in referring to several cases in which the Powers did not hesitate to submit to arbitration matters in which the territorial integrity or the municipal laws were involved. (Arbitration between Great Britain and Portugal concerning the Azores, etc.)

He wonders even if it is easy to imagine cases to be submitted to arbitration which would touch neither the independence, nor the territorial integrity nor the institutions, nor the municipal laws of the States in controversy, especially if,

as stated in Article 4, each State remains free to decide this matter in an exclusive manner.

His Excellency Mr. **Ruy Barbosa** would in the first place call to the attention of his Excellency Mr. MILOVAN MILOVANOVITCH the fact that the presence of reservations, and of exceptions to the principle of obligatory arbitration is found in all the propositions submitted to the committee. Even the Portuguese proposition, the most radical of them all, admits this reservation, while establishing at the same time, it is true, a group of cases in which they are no longer
[407] foreseen. If, therefore, we admit, as a general rule, the necessity of including in a general arbitration convention reservations of this character, will it not be necessary to leave to the parties themselves the right of accepting and of declaring them? Who but the nation itself can be the judge of the existence of the case of the honor or of the essential interest of a nation? This phase of the matter has never been discussed. Even in the project adopted by the Interparliamentary Union at its congress of 1904 in St. Louis, the most extensive of all the projects formulated to the present time, the right of the parties is admitted to decide for themselves if the difference concerns their independence, their sovereign authority, their vital interests, or those of third Powers. This clause is very explicit in that project. Why should then fault be found with it in the Brazilian proposition, and why should we see in it a proof of its illiberalness?

Are we intending to impose upon the States a power superior to themselves? Who would decide about the cases for the application of these reservations? Who would there be to tell them when their independence, their sovereignty, or their honor are involved?

In reference to Article 3, his Excellency Mr. RUY BARBOSA wishes to state that there can be no objection to having it admitted in the text of the arbitration convention. The Government of his country would wish that in disputes concerning inhabited territories, the populations should be consulted in regard to the nationality under which it is intended to place them. He is well aware of the criticisms opposed to the system as well as of the powerful interests which dictated these criticisms. But in spite of that, or rather because of that very fact, he finds that this system is built upon liberal and just ideas. If certain political preventions and agreements are against this system, expression should be given to them. The Brazilian Government will none the less avail itself of its right to bring up that question whenever the opportunity arises for it to do so.

Coming to the objection which had been presented by his Excellency Mr. MARTENS, his Excellency Mr. RUY BARBOSA informs the committee that in so far as territorial integrity is concerned, his proposition has established no restriction other than that which is implicitly contained in the terms "essential interests." If we are to consider a question of fact, or if we are to determine on the land itself the exact boundaries of two States, he is absolutely in favor of arbitration, even obligatory arbitration—his proposition is upon this point in agreement with the proposition of Portugal. But if, on the contrary, we are considering the sovereign rights of a State within a well-determined territory, will anyone deny that territorial integrity is an essential interest? His Excellency Mr. MARTENS will no doubt agree with him in declaring that, if even in this hypothesis the parties may have recourse to arbitration, it will be impossible to force them into arbitration. Does not the territory constitute the very basis of

the existence of a nation? Do not the questions of territorial integrity, affecting as they do one of the palpable elements of the essence of the State itself, almost always concern the honor of the State? In this question of territory let him who may state where ends the point of honor and where begins the juridical phase. Whatever may be said in connection with this matter, it is certain that if you admit the reservation of the questions affecting the honor of the peoples (and everyone admits it), the Governments will not fail, if necessary, to include in it territorial integrity. The Brazilian proposition has only set forth in this matter an idea implicitly contained in an old formula, in a general form, admitted by everyone.

His Excellency Mr. Ruy Barbosa then passes on to a consideration of the objection presented by his Excellency Mr. Milovan Milovanovitch concerning the reservation of the municipal laws. He fears that the delegate from Serbia lost sight of the fact that in the hypothesis of an international treaty approved by a municipal law of a State, we are dealing with something which is more than a law. He finds in such a treaty, furthermore, a bilateral obligation which the legislative power of that State is absolutely bound to respect. The Brazilian proposition only deals with the laws exclusively enacted by the national
[408] authorities. It refers to laws and to institutions. It has in mind, therefore, laws connected with the institutions, especially those which insure the administration of justice and give to the magistracy the exclusive competence of settling private disputes. The Brazilian proposition means especially to condemn certain propositions which pretend to compel the Governments to submit to arbitration matters in which the enforcement of the laws has been entrusted to the magistracy, by incapacitating the latter from judging pending cases, or by having the decisions of the national courts revised by foreign courts.

His Excellency Mr. **Guido Fusinato** states that he is in full agreement with the views expressed by his Excellency Mr. Milovan Milovanovitch. It is possible for a municipal law to be in contradiction with international law or with a treaty. A State has not the right to disregard an international obligation by alleging a provision, positive or negative, of its municipal legislation.

Furthermore, in excluding the municipal laws one might move for the exclusion of international conventions in so far as they must be approved by a law.

His Excellency Mr. **Ruy Barbosa** states once more that international conventions are municipal laws only in the sense that they bind the authorities of the country—but at the same time they bind the parties, and from this point of view they are international laws. The latter are not regarded as municipal laws in the Brazilian proposition which does not refer to them in any manner whatever.

His Excellency Sir **Edward Fry** states that the British delegation is not inclined to accept the Brazilian formula, but that it agrees to that of the proposition of the United States of America.

Mr. **Heinrich Lammasch** approves of the criticisms which his Excellency Mr. Milovan Milovanovitch and Mr. Guido Fusinato have presented in regard to the Brazilian proposition; the rule as well as the reservations of the latter seem to him formulated in an arbitrary and vague manner; one could not well state whether it is going too far, or whether it is going far enough.

His Excellency Mr. **Luis M. Drago** sets forth that the internal laws which the English internationalists call "municipal laws," in contradistinction to the

law of nations, are frequently in contradiction to the treaties. The case has occurred with some frequency in the United States where the Supreme Court decided that for the internal order, the law must prevail over the treaties and has applied this decision to particular cases which had been submitted to it. At the same time, however, it has declared that if, as a consequence of this interpretation, international conflicts should arise with the signatory nation of the treaty disregarded by the application of the municipal law, it devolves upon the executive department, upon the Ministry of Foreign Affairs, to settle, through international means, a question which did not come within the jurisdiction of the courts. This being so, the provisions of the municipal laws should not be regarded as having to be excluded from obligatory arbitration treaties. By themselves they form a class of provisions which, while corresponding to the domestic law, are not opposed to the conclusion of the treaty which, in case of conflict, would always be applied by the department charged with foreign relations, notwithstanding the application of the law by the local courts, as the Supreme Court of the United States has done.

Mr. DRAGO concludes by declaring that it would be more practical to enumerate by name the cases of obligatory arbitration, instead of reserving exceptions in terms necessarily vague and indefinite.

His Excellency Mr. **Ruy Barbosa** remarks that he has already answered the objection presented by Mr. DRAGO. If laws posterior to the treaties con-
[409] tradict them, the latter must prevail, for whenever treaties create bilateral obligations, it is quite evident that one of the two contracting parties may not abrogate them without the consent of the other. It is evident, furthermore, that when we are speaking of laws which cannot be made the object of international arbitration, we are not referring to those that might incline to annul a convention concluded between several Powers.

The **President** shares the view just expressed and believes that the enumeration of cases of obligatory arbitration would alone furnish us with a solid basis. He fears the vague nature of the Brazilian proposition, and especially of its Article 4, which, according to the ideas prevailing in the different States, would be susceptible of very wide or very restrictive interpretations.

His Excellency Mr. **Ruy Barbosa** states that the Brazilian delegation is not opposed to the acceptance of other systems, in case its own is not favorably received. He states, however, that the vagueness laid at the door of the Brazilian proposition is encountered in all other propositions that have been submitted.

The **President** reviews the discussion and finds that the Brazilian proposition is not supported.

In the program for the next meeting, fixed for Tuesday, August 6, at 3 o'clock, he includes the discussion of the propositions of Portugal, of the United States and of Sweden.

The meeting is closed at 7 o'clock.

[410] **Annex**

PROPOSITIONS CONCERNING ARTICLE 16 OF THE CONVENTION OF 1899

ARBITRATION

Section 1.—Propositions for Obligatory Arbitration

1. *For all differences without restriction.*

DOMINICAN REPUBLIC:

". . . . expresses its desire for unrestricted international obligatory arbitration." [1]

DENMARK:

Points to her Conventions with the Netherlands (February 12, 1904), Italy (December 16, 1905), Portugal (March 20, 1907), stipulating obligatory arbitration without reservation.

The Government of Denmark, by the conclusion of these conventions, has sufficiently set forth its point of view and its desires in this matter, and the Danish delegation has the honor to call the attention of the subcommission to the texts above cited.[2]

2. *For all questions involving neither the independence, the territorial integrity, the essential interests, the municipal instructions or laws, nor the interests of third Powers.*

BRAZIL:

In disputes relating to inhabited territories, recourse shall not be had to arbitration except with the prior consent of the peoples interested in the decision.[3]

3. *For the interpretation of all treaties or for differences of a legal nature.*

a) SWEDEN:

Under reservation, freely appreciated, of vital interests or independence.[4]

[411] b) PORTUGAL:

Under reservation, freely appreciated, of essential interests, of independence, of the interests of third Powers.[5]

[1] Annex 24.
[2] Annex 25.
[3] Annex 23.
[4] Annex 22. (For the enumeration of a certain number of cases in which arbitration is unreservedly obligatory, see *post,* section 7.)
[5] Annex 19. (For the enumeration of a certain number of treaties, for the interpretation of which arbitration is proposed without the freedom of appreciation of the reservations above, see *post,* section 5.)

c) THE UNITED STATES:

Under reservation, freely appreciated, of vital interests, of independence, of honor, of the interests of third Powers.[1]

4. *For the interpretation and the application of commercial treaties and of the conventions and arrangements annexed thereto, and of treaties of an economic, administrative and legal nature.*

SERBIA:

. . . the signatory Powers . . . obligate themselves to have recourse to arbitration and to submit their disputes to the Hague Arbitral Court:

a) For all that which concerns the *interpretation and the application of commercial treaties* and of the conventions and arrangements which, in whatever form, are annexed thereto, as well as *all other treaties,* conventions and arrangements relating to the settlement of *economic, administrative and juridical interests.*

b) (Execution of pecuniary engagements and damages. See below, section 7).[2]

5. *For the interpretation or the application of conventions already concluded or to be concluded, enumerated hereinafter:*

a) PORTUGAL:[3]

a. Treaties of commerce and navigation;
b. Conventions regarding the international protection of workmen;
c. Postal, telegraph and telephone conventions;
d. Conventions concerning the protection of submarine cables;
e. Conventions concerning railroads;
f. Conventions and regulations concerning collisions (*abordages*);
g. Conventions concerning literary and artistic property;
h. Conventions concerning industrial property, trade-marks, and trade name;
i. Conventions concerning regulation of companies;
k. Conventions concerning monetary and metric systems;
l. Conventions concerning free aid to the indigent sick;
m. Sanitary conventions, on epizooty, phylloxera, and other similar pestilences;
n. Conventions concerning private international law;
o. Conventions concerning civil or penal procedure;
p. Conventions concerning extradition;
q. Conventions concerning diplomatic and consular privileges;[4]

[412] b) GREECE:

Reconsideration of Article 10 of the Russian propositions of 1899.

Obligatory arbitration, *under reservation* of the vital interests and of national honor, in case of disputes concerning the interpretation or the application of the conventions enumerated below:

[1] Annex 37.
[2] Annex 29.
[3] See above, section 3, paragraph b.
[4] Annex 34.

1. Conventions relating to posts, telegraphs, and telephones.
2. Conventions concerning the protection of submarine cables.
3. Conventions concerning railways.
4. Conventions and regulations concerning the means for preventing collisions of vessels at sea.
5. Conventions concerning the protection of literary and artistic works.
6. Conventions concerning the protection of industrial property (patents, trade-marks, and trade name).
7. Conventions concerning the system of weights and measures.
8. Conventions concerning reciprocal free aid to the indigent sick.
9. Sanitary conventions, conventions concerning epizooty, phylloxera and other similar pestilences.
10. Conventions concerning civil procedure.
11. Conventions of extradition.
12. Conventions of delimitation, so far as they concern purely technical and non-political questions.[1]

6. *For boundary questions:*

PORTUGAL:

Settlement on the land of the fixation of boundaries.[2]

7. *For pecuniary claims:*

DOMINICAN REPUBLIC:

(Especially upon this question, in a general way, see above, section 1.)

All claims of a purely pecuniary origin arising either *from public loans,* or from other *contract debts,* or from *damages and losses.*

No coercive measure, excepting in the case of refusal of arbitration or of the execution of the award.[3]

CHILE:

All claims of private individuals of one State against another State, *being of a pecuniary character,* arising from pecuniary *damages and losses* or arising from *breach of contracts.*[4]

VENEZUELA:

Claims of private individuals of one State against another State for *breach of contracts.*

Disputes between States for claims for *damages and losses not arising from contracts.*

In no case coercive measures.[5]

[413] SERBIA:

Execution of pecuniary agreements, payment of indemnities, reparation for material damages, between States; between State and private individual.[6]

[1] Annex 68.
[2] Annex 34.
[3] Annex 51.
[4] Annex 52.
[5] Annex 54.
[6] Annex 29.

PORTUGAL:

Pecuniary claims for damages, the right to damages having been recognized. *"Questions relating to debts."* [1]

SWEDEN:

Pecuniary claims for damages, the right to damage having been recognized.

Pecuniary claims involving the *interpretation or application of conventions* of every kind.

Pecuniary claims for acts of war, civil war, pacific blockade, arrest of foreigners, seizure of their goods.[2]

GREECE:

Reconsideration of Article 10 of the Russian propositions of 1899.

Pecuniary claims *for damages,* the right to damages having been recognized.[3]

Section 2.—Proposition of the United States of America

For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin, arising from contract debts, which are claimed as due to the subjects or citizens of one country by the Government of another country, and in order to guarantee that all contract debts of this nature which it may have been impossible to settle amicably through the diplomatic channel shall be submitted to arbitration, it is agreed that there cannot be recourse to any coercive measure involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the creditor and refused or not answered by the debtor, or until arbitration has taken place and the debtor State has failed to comply with the award made.[4]

MEXICO:

Add, in the proposition of the United States of America (Annex 50) after the words *"through the diplomatic channel"* the words *"when it proceeds according to the principles of international law."* [5]

Section 3.—Eventual Organization of Arbitration for a Group of States

URUGUAY:

Whenever ten nations, of which half shall have at least twenty-five million inhabitants each, shall agree to submit their differences to arbitration they shall have the right to form an alliance in favor of obligatory arbitration. This alliance shall intervene only in cases of international disputes, and shall not interfere in the internal affairs of any country.[6]

[1] Annex 34.
[2] Annex 22.
[3] Annex 68.
[4] Annex 50.
[5] Annex 58.
[6] Annex 47.

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SIXTH MEETING

AUGUST 6, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

His Excellency Mr. **Alberto d'Oliveira** approves of the table prepared by Mr. FROMAGEOT.[1]

He points, however, to a difference between the American proposition, on the one hand, and those of Sweden and Portugal, on the other. The first article of the American proposition includes, indeed, the obligation of submitting all differences to the Hague Court. This provision which seems to exclude the competence of any other court, cannot fail to attract the attention of the committee.

Mr. **James Brown Scott** declares that Article 1 of the American proposition has in view only obligatory arbitration and does in no way tend to establish one single competent court.

His Excellency Sir **Edward Fry** proposes to specify clearly that the parties are free to address themselves, either to the court created in 1899, or to that which it is now proposed to create, or again to any other jurisdiction of their choosing.

In case this matter is passed over in silence in the *compromis,* the new court would, of full right, be competent.

His Excellency Mr. **Asser** believes that this question must be reserved until such time when the labors concerning arbitration and the court are further advanced.

The **President** takes note of the proposition of his Excellency Sir EDWARD FRY, and declares that the committee is unanimously agreed expressedly to reserve to the parties the freedom of choosing the court or the jurisdiction that they think proper; he shares, however, the judgment of his Excellency Mr. ASSER and thinks that the question cannot now be discussed whether the new court to be created shall or shall not enjoy a preferential right; we must begin by deciding upon its existence.

Upon the proposition of the PRESIDENT, the committee passes on to the examination of paragraph 3 of the table prepared by Mr. FROMAGEOT and the Swedish proposition.[2]

[415] His Excellency Mr. **Hammarskjöld**: It has been stated and repeated by men more competent than myself that if the Conference desired to establish the principle of obligatory arbitration, with reservations, it should do so for certain cases which it would have to determine. I share the opinion

[1] Annex to the minutes of the fifth meeting.
[2] Annex 22.

expressed in regard to this matter; moreover, the Swedish proposition contains a list of such cases.

I believe, nevertheless, that we must not confine ourselves to a mere enumeration, but that it will be necessary to inscribe at the beginning of the Convention, a formula that shall contain a conditional general obligation for recourse to arbitration.

This general obligation is already inscribed in something like twenty international treaties—would not an isolated enumeration, therefore, seem to mark a backward step? On the other hand, in my judgment, a mere enumeration places too narrow limits on obligatory arbitration. We must open the way to its development and make possible the constant increase of cases to which it may be applied. The hesitancy which will be shown by States which shall have subscribed to the general principle of invoking reservations, will gradually and automatically lead them to extend the scope of obligatory arbitration.

From this point of view, I find fault with the Serbian formula for not having provided for this automatic development and for requiring for each new case an international treaty.

On the contrary, the general formulas, inscribed in the Swedish and Portuguese projects, are of an almost identical tenor; I believe, therefore, that it will be well to bring them together to discussion.

His Excellency Mr. **Alberto d'Oliveira** agrees with his Excellency Mr. HAMMARSKJÖLD regarding this matter. He cordially consents to all the considerations expressed by his colleague from Sweden in favor of a general formula, and declares that the views and the propositions of Sweden and Portugal are almost identical. By including a general formula in the international treaties, the States will become accustomed to the idea that, in juridical questions, arbitration is the rule and that it requires serious reasons not to have recourse to it.

There is no doubt but that a State acting in bad faith may always find a means by which to avoid having recourse to arbitration; but emphatically engaged to have recourse to it, it will be forced to give reasons for its refusal, and then its difficulties will begin. Its reasons cannot remain secret; they will be the object of public discussions, of newspaper comment, of criticisms from jurists, of the deliberations of learned societies and of the criticisms of the entire civilized world. If they are bad and unavowable, it will be in an embarrassing position before public opinion; it will expose itself to being condemned, and by itself, this condemnation will constitute for the other party an appreciable moral satisfaction, and to a certain extent will be a compensation for the prejudice occasioned. Thus, even in a case where arbitration could not be established, it cannot be denied that it would be advantageous to adopt a general formula.

It has been said that Article 16 of the Convention of 1899 contains a more efficacious provision than is contained in the corresponding article of the Portuguese proposition; I do not think so, because the Governments have since believed it useful to conclude numerous arbitration treaties, the object of which has been to change the mere recommendation of the old Article 16 into an obligation.

Fault has been found with our formula for not having been planned for a world treaty; it is said that what would be perfect for treaties between two States, would not be so for a collective treaty. This may be so; but we believe that we will be able to meet this objection with only a few words by recalling that our formula does not materially differ from that which the jurists of 1899 had pre-

cisely recommended with a view to a world treaty; and if it should be subjected to criticism, we would answer that it meets the conditions of a world treaty, but that it is rather restricted for particular treaties.

[416] The Swedish delegation has in its proposition, retained the text of Article 16 of the Convention of 1899, and follows it up with a second paragraph containing the principle of obligation. I believe that if the principle, common to the Portuguese, Swedish and American propositions, were adopted by the committee, it would be necessary to omit as useless the present text of Article 16.

In limiting the recommendation contained in this article to matters of a legal nature, one would expose oneself to restrictive interpretations.

Did not his Excellency Mr. MARTENS tell us that many arbitration cases recorded by history would not, in his judgment, come within the scope foreseen by the Convention? It would, therefore, be necessary to substitute a wider formula for the wording of Article 16. In consequence, and in case our general formula for obligatory arbitration were accepted, I have the honor to request, either that Article 16 should be omitted, or that in it we should clearly declare that arbitration is always regarded as one of the most efficacious means for settling a dispute between States.

His Excellency Mr. **Ruy Barbosa** wishes to know why the Portuguese formula omitted all reference to honor. Is it because it is regarded as included in that of essential interests? Or is it because matters of honor are not excluded from those susceptible of arbitration?

His Excellency Sir **Edward Fry** observes that it is extremely difficult to ascertain whether the numerous conventions figuring under Article 16 *b* of the Portuguese list contain any provision regarding honor or vital interests. In order to find out about this, each country would first have to submit all treaties coming within these classes to a minute analysis.

This very great task is not possible or, at least, it could not be undertaken properly.

Mr. **Kriege**: I wish to be permitted to expound in the name of the German delegation, the result to which it has come with regard to the propositions from the delegations of the United States, of Portugal and of Sweden concerning the establishment of obligatory arbitration for all disputes of a juridical nature, or relating to the interpretation of treaties. It is not necessary for me to assure you that we are not unappreciative of the spirit which dictated the text of these propositions, and we render homage both to the authors of the projects and to the distinguished statesmen whose instructions they have followed out, in presenting them for the approval of the Conference. It is, therefore, with very sincere regret that in the course of our deliberations we have seen confirmed and emphasized the doubts which his Excellency Baron MARSCHALL VON BIEBERSTEIN had expressed concerning the advantages which their application would confer upon the cause of arbitration.

We are unanimous in admitting that among the differences of a juridical nature there are certain disputes which must necessarily be excluded from arbitration. They are those concerning the honor, the independence and the vital interests of the States. We must likewise admit that the question as to whether or not a special dispute comes within this class may lead to different views, and we are, therefore, attempting to get around the difficulty by inserting in the

treaty a stipulation declaring that it is the right of each Power to decide this matter in the full independence of its sovereignty.

His Excellency Baron MARSCHALL VON BIEBERSTEIN has already called the attention of the subcommission to the fact that this state of things which compromises, even in a treaty between two States, the obligatory character of arbitration must necessarily become accentuated by reason of the number of the contracting parties, and that in a treaty, signed by almost all of the Powers, the elements of uncertainty contained in the restrictive clause, will be such that there will not be anything left of it except the name of an obligation.

[417] His Excellency Baron VON BIEBERSTEIN has likewise emphasized the influence which the provisions of the constitution of certain countries might exercise in this respect. In his remarkable exposition in the meeting of July 18, his Excellency Mr. JOSEPH H. CHOATE mentioned, for instance, the fact that in the United States of America, the *compromis* determining in each particular case the object of the dispute and the scope of the powers of the arbitrators must be approved by another branch of the Government than the one which negotiates it, that is to say, by the Senate. A numerous body, composed by way of election, being thus charged with the application of the restrictive clause, its interpretation is exposed to all the chances of a parliamentary vote. In other States having similar laws it might happen that, when another contracting State calls for the settlement of a dispute through arbitration, the legislative branch, instead of confining itself to the single question as to whether or not the dispute concerns the honor or the vital interests, might turn to the arbitration treaty itself and be influenced by the consideration whether in the case, the decision of the difference by an arbitral vote is in the interest of the State. It is evident, therefore, that as his Excellency Baron MARSCHALL VON BIEBERSTEIN has shown, a permanent arbitration treaty has not, with regard to such States, the character of a bilateral obligation and binds only the other contractants.

It seems that the ideas which I have just outlined have not failed to exercise a certain effect upon the partisans of world arbitration themselves. This would at least explain the change introduced into the text of the proposition of the United States. According to the revised text, each State would have the right not merely of withdrawing, in a general way, from the treaty, but even of denouncing it with regard to some particular Power. This denunciation would produce its effect after a lapse of six months, whilst the already existing arbitration treaties regularly admit denunciation only after a more or less prolonged lapse of time and fix an interval of one year between the denunciation and the cessation of the conventional obligations.

It is no doubt very interesting to find that it is deemed necessary to surround world arbitration with so many precautions. It might be possible to conclude from this that people have but slight confidence in the vitality of the institution. As for ourselves, we cling to the opinion that we must not allow ourselves to be bewitched by words. In our conviction, the acceptance of the projects in question would be but a factitious progress. They are obligatory only in form and not in essence. The discussions of the subcommission have, moreover, shown that we are not the only ones to doubt the obligatory force of such a treaty, of the *juris vinculum* which it would constitute.

It has been stated that the nations are not solely governed by juridical con-

ceptions nor mutually united only by *juris vincula.* We gladly admit the correctness of this argument. We are impressed by it all the more because it is supported by the authority of the first delegate from Great Britain who is the Nestor of English jurists, and who has for many years occupied the position of first judge of England.

On the basis of this idea, it has been maintained that the conclusion of a world arbitration treaty, no matter how defective from the juridical point of view, would have great importance from the moral point of view as representing the collective impression of the conscience of the civilized world. We do not share this view.

Although we must not exaggerate the importance of juridical conceptions, yet we must be careful not to underestimate them. The conviction of the Governments that arbitration represents the most efficacious and the most equitable means for settling the disputes of a juridical nature, has been consecrated by Article 16 of the Convention of 1899. To the provisions of this Conven-
[418] tion are due the arbitration treaties concluded since that time between the States. The moral value of this declaration would not be increased by giving to it the form and not the force of a juridicial obligation. On the contrary we would run the danger of compromising the great idea of obligatory arbitration.

We would even run the danger of preventing its development by barring the way to the Governments which might be inclined to enter upon it with truly obligatory treaties toward the States and in regard to questions where this might be possible, and to organize this arbitration according to the exigencies of the special circumstances. In this respect, the conclusion of a world arbitration treaty would, therefore, not only be useless but harmful.

It contains even a further danger of very great gravity. It would be erroneous to believe that we can make short work of controversies concerning the interpretation of the so-called clause of honor, by stipulating that it will devolve exclusively upon each State to decide whether it is necessary to apply it. As I have stated, it is inevitable that questions relating thereto will be looked upon by the States from very different points of view. It is hardly to be expected that they will always accept the decision of the opponent. The claims of the State which called for arbitration and which have met with resistance, will, no doubt, frequently form the object of diplomatic efforts, and, in view of the delicate nature of the question under discussion, might be susceptible of leading to serious complications.

In these circumstances, and for the reasons just stated, the German delegation cannot give its adhesion to any one of the projects directed to the establishment of obligatory and world arbitration for all matters of a juridical nature, or relative to the interpretation of treaties. The German delegation will vote against these propositions.

His Excellency Mr. **Mérey von Kapos-Mére:** Most of the propositions which have been laid before us concerning obligatory arbitration, are divided into two distinct parts, and it seems to me necessary to keep this distinction clear. In the first place, we are dealing with a more or less general formula containing the reservations of honor, of independence and of essential interests; and in the second place, we have before us a list of questions to which obligatory arbitration, properly speaking, might be applied. The first part is intended to take the place of Article 16 of the present Convention. But as we are aware that

the general formula as proposed by several Powers, has led to certain apprehensions, I believe it would be better to retain the present text of Article 16; yet, I take the opportunity of presenting a conciliating proposition upon which, moreover, I shall not insist, if it should meet with serious objections.

The essence of Part IV, Chapter I of the Convention of 1899 for the pacific settlement of international disputes, rests in the provision of Article 16. This article confines itself to the enunciation of a principle of a purely theoretical value by attributing to arbitration, as a possible means of settling international disputes, the character of the highest efficacy and equity, without, however, recommending the application of this principle in practice, even in the most cautious terms.

Now, it seems to me that we ought to express ourselves a little more clearly, and in the Convention itself draw *expressis verbis* the conclusion from the premises formulated in a measure by its Article 16 by accentuating and reinforcing in this manner, I venture to say, the idea of arbitration.

It is along this line of ideas that I take the liberty of proposing the addition to Article 16 of a paragraph which might read about as follows:

> Consequently, it would be desirable that in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.

[419] His Excellency Mr. **Milovan Milovanovitch** believes that the first and most important question to be settled by the committee is whether the principle of obligatory arbitration for certain definite cases shall be admitted, so that the demand of one interested party for obligatory arbitration would suffice to compel the other party to accept it.

In his judgment, therefore, the essential thing in this matter is to determine the cases in which the willingness of one of the parties asking to be judged, would be sufficient to oblige the other party to accept arbitration.

If the principle of obligatory arbitration is admitted, it will next be necessary to be specific in regard to its scope. In this hypothesis it might perhaps be desirable to adopt a supplementary general formula bearing upon the cases not enumerated.

If, on the other hand, an understanding cannot be reached in regard to this matter, his Excellency Mr. Milovan Milovanovitch fully shares the view expressed by the honorable delegate from Germany, who believes that any change of mere form and of appearance made in Article 16, can only be harmful.

He takes the opportunity of adding that diverging interpretations, to which such modifications might give rise, appear in a very unfavorable light, above all and especially to the weak and small States, because their situation would, in this manner, not be improved but rendered worse. In consequence, the essential thing to do would be to begin voting upon those questions for which it is agreed to admit obligatory arbitration. If, along this line of ideas nothing can be achieved, then let us retain Article 16, by adding to it the amendment proposed by his Excellency Mr. Mérey von Kapos-Mére.

His Excellency Mr. **Hammarskjöld** in agreeing with the views expressed by his Excellency Mr. Alberto d'Oliveira, observes that the general clause of obligatory arbitration is included in many treaties. Eighteen treaties containing this formula have been concluded. A State which respects itself, declares his

Excellency Mr. HAMMARSKJÖLD, will think too highly of its honor to invoke it without reason. The introduction of the general principle into the Convention will make it difficult to elude arbitration.

For this reason his Excellency Mr. HAMMARSKJÖLD does not favor the view expressed by Mr. KRIEGE; he believes that the general clause does not want in practical value, and, at the same time, he thinks it very important to enumerate the cases without reservation.

It is true that certain treaties stipulate that each State shall be free to decide whether the reservation is applicable, but this provision, which has for its object all possible guarantees for the small States, and which is not met with in all treaties, has not given rise to any difficulties.

His Excellency Mr. HAMMARSKJÖLD believes that the omission of Article 16, which contains the solemn enunciation of the principle of arbitration, would be unfortunate, and he expresses himself in favor of the retention of this article, reproduced in his project as the first paragraph.

His Excellency Mr. **Asser** calls attention to certain numbers of the list contained in Article 16 *b* of the Portuguese proposition.

It seems that among these conventions, there are many which refer to civil law and for which the national tribunals are competent.

An international tribunal cannot be competent to settle disputes of this nature if the States do not make the causes of their subjects their own and if they do not in this manner give them an international character.

Mr. **Heinrich Lammasch** desires to add a few words to those of Mr. MÉREY.

The proposition of the first delegate from Austria-Hungary draws but the consequences from the purely theoretical declaration of Article 16. It is
[420] true the new paragraph proposed by Mr. MÉREY does not hold a *vinculum juris,* but it constitutes, nevertheless, a forward step toward the goal pursued, and makes of arbitration the normal means for the settlement of international differences.

As to the remarks which have come from his Excellency Mr. ASSER, Mr. HEINRICH LAMMASCH admits that the international courts are alone called upon to act upon differences between individuals; but the definition of the rights of the individuals may depend upon the interpretation of an international treaty.

This question is the only one which may come within the competence of an international court. The latter could not change the decisions of the international jurisdictions, but the interpretations given may guide them.

Mr. HEINRICH LAMMASCH proposes to add to Article 16 *b,* a final clause reading as follows:

> It is well understood that in the cases enumerated in . . . the arbitral tribunal shall not be competent to reform and declare invalid decisions of the courts of the contracting Powers, but that its duty shall be strictly limited to the interpretation of the treaty provision in dispute. However, this interpretation shall guide the authorities of the Powers between which the arbitration has arisen, in the application of that provision in the future.

His Excellency Mr. **Asser** congratulates himself for having induced the remarks of Mr. LAMMASCH, and he declares that he is in agreement with him

in regard to an important point; disputes between private individuals come exclusively within the competence of the national judge.

Nevertheless, the honorable delegate from Austria-Hungary has added that the decisions of an international court to which appeal might have been made, shall serve as a rule to be followed by the national courts for the application of the law.

His Excellency Mr. ASSER is afraid of giving such an authority to arbitral awards and of conferring upon an international court a power which the most of the States have not even granted to their courts of appeal. He has regarded the enumeration contained in the Portuguese proposition as solely directed to disputes between one State and another.

His Excellency Mr. **Alberto d'Oliveira** admits the inherent interest of the remarks presented by Mr. LAMMASCH and his Excellency Mr. ASSER; these remarks bring him to participate in the discussion of Article 16. In presenting its proposition, the Portuguese delegation wrought no innovation; it did not mean to bring up the question of sovereignty; it did not mean to remove from the jurisdiction of the interested country the questions for which it is competent; I point to the fact that Article 16 *b* is the work: (1) of the Russian delegation at the First Peace Conference; (2) of the committee of examination of this Convention which has *adopted* a part of the Russian enumeration. As for the rest, we have taken the articles proposed and adopted by the London Interparliamentary Conference, held in the month of July, 1906. It is true that among the cases indicated in these articles there are some that may injure certain of our interests. We know it; but we gladly made this necessary sacrifice; we have thus wished to set an example of disinterestedness by renouncing certain of the cases that might give rise to objections, or by modifying our enumeration. To such eminent jurists as Messrs. ASSER, LAMMASCH, RENAULT, KRIEGE and MARTENS, we shall gladly entrust the care of rounding off and polishing our proposition.

Having now established this first point in reference to this list, I pass on to the matter of the general formula and to the objections offered by Mr. KRIEGE. The delegate from Germany will certainly permit me to perform my mission, in the manner in which I ought to, by making a clear answer to his objec-
[421] tion. He wonders if our project makes for real improvement in the old Article 16. My answer is as follows: Our intention is the same as that of the amendment proposed by the Austro-Hungarian delegation. What is it the latter has called for? A third, a half of what we ourselves have called for; but on the whole the same thing. We said "*the Powers agree,*" and Mr. MÉREY suggests the words "*deem it expedient and desirable.*" It is but a question of degree in the expression of one and the same idea. If the Portuguese proposition goes a little further than the Austrian proposition, the two constitute progress none the less, and it is, in consequence, demonstrated in the two cases that it is necessary to improve the old Article 16. All of us feel that we must progress further than in 1899; this is demanded by public opinion to which is due the meeting of the Second Peace Conference. If we believe it useless to advance the cause of arbitration, it would be better that we should declare so frankly, rather than to take back with one hand what is given by the other.

Mr. MILOVANOVITCH has stated that the weak States would be forced to accept arbitration, even in case it were contrary to their interests.

I confess that I cannot admit nor even comprehend this point of view; for in my judgment the very function of arbitration is to furnish an acceptable and pacific settlement precisely to those States whose forces are unequal, rather than to the States of equal power. I am well aware of the fact that it is being said day by day that in theory there are neither small nor great States and that all States are equal before the courts and the international conscience; these are words which I love to hear; but I would love even better to see the reality to which they should correspond. Now, according to us, the use of arbitration will always be more or less restricted between great States; it is clear that any dispute between these States will be settled through an equitable agreement or through war.

Between the great and small States, on the contrary, since the means of war are out of the question, there will be all sorts of unsatisfactory settlements with which the small State will have to content itself. Now, can there be, for a small State, a better means than arbitration for settling its differences with a great Power? Can it wish for a more advantageous one? Obligatory arbitration is a buffer between force and weakness. How can the small State be inconvenienced by being obliged to accept arbitration when its diplomacy has failed? Really I have sought to discover it but am unable to find any inconvenience. How could a weak State distrust the only means which, before the arbitrators, establishes its equality with the strong, an equality no longer theoretical but positive?

The only danger of the proposed formula lies, on the contrary, in the possibility that the great Powers may attempt to free themselves from their obligation to the small Powers and even to evade it; this is indeed the truth. But, in admitting this hypothesis, the strong State will be considered in the wrong by universal opinion (which is not to be overlooked) and on the contrary, it will place in a favorable light the State which has remained faithful to the obligation contracted. Moral sanctions can no longer be held negligible; if a State attempts to free itself, the adverse State will find a ready support in public opinion, as I have before stated; it will have other measures at its disposal, particularly the denunciation of the treaty containing the evaded obligation; this would be at the same time a protest, a censure, and a public accusation of bad faith, which if established, would always stigmatize the offending State, whether it be great or small. So far as our project is concerned, we do not ask the division of the vote on Article 16 *b*. The general formula cannot be detached from the list, and we ask a vote on our entire proposition.

Mr. **Guido Fusinato** asks in the first instance if, after the important declaration of Mr. KRIEGE, it is necessary to enter into a detailed examina-
[422] tion of the propositions and if it would not be more practical to pass to a vote on the principle.

He then communicates to the committee his doubts concerning the wording of Article 16 of the Portuguese proposition. Is the addition of the words "interests of the third Powers" justified? On the contrary, does it not present serious inconveniences? It seems to him that it would exclude several numbers from the list, such as commercial treaties in consequence of the most-favored-nation clause.

Passing next to the question raised by Mr. Asser, Mr. Fusinato says that he shares his opinion concerning a terminated action. But he thinks that for the future, the interpretation made through agreement of the Parties by an international tribunal, should have obligatory force for national tribunals. The acceptance of arbitration signifies the previous acceptance of the interpretation of the arbitral tribunal as the authentic interpretation. The convention does not exist for the Parties except with the interpretation which is officially and conventionally given to it, so to say, by the tribunal chosen for that purpose.

A difficulty arises when we have before us conventions concluded by more than two Powers. Although it may be said that the arbitral award will be obligatory only for the two Parties in controversy, or that it will be imposed upon all the Powers, serious objections arise and a solution of the problem seems difficult. Mr. Fusinato agrees to the principle of the Portuguese proposition, but he reserves to himself the right, later on, to make other remarks, especially with regard to Article 3.

His Excellency Mr. **Martens** observes that the Russian delegation has not deemed it necessary to renew the propositions concerning obligatory arbitration, which it had deposited at the time of the First Conference; but from this it should not be inferred that Russia may have renounced her traditions of 1899. She has forgotten nothing and has learned much. The Russian delegation believes now, as in 1899, that it is desirable to come to an understanding concerning the enumeration of some cases of obligatory arbitration. It will be necessary, in the first place, to state the general principle of arbitration; afterwards the States shall signalize themselves the cases in which the reservations of honor and of vital interests, etc., are not applicable.

The Russian delegation believes that such cases exist. On first sight, one may state that reservations which have already been mentioned are not applicable to questions pertaining to private international law, to civil and penal procedure, to industrial property and to pecuniary claims arising from damages, the right to damages having been, furthermore, recognized. This enumeration is given only by way of illustration. The general idea which guided us in 1899 is that we should not confine ourselves to a vague formula but that we must specify certain cases. If we could attain that object, we would have taken a real step forward.

His Excellency Mr. **Milovan Milovanovitch** is afraid that his words may have been misunderstood, and he wishes to make his point of view clear.

He is not opposed, absolutely, to the general formulas contained in the Swedish, Portuguese and American propositions. But he does not desire them isolated without the succeeding articles, enumerating the cases in which the principle of obligatory arbitration admits neither restriction nor exception.

That which appears to him to be of capital interest is to agree upon a certain number of cases specifically definite, for which, properly speaking, obligatory arbitration will be provided.

If an agreement can be reached upon this matter, he will regard a general formula as a very happy and useful complement.

[423] In answer to the remarks of his Excellency Mr. Alberto d'Oliveira, his Excellency Mr. Milovan Milovanovitch reiterates his fears of seeing the weak States suffer from the inconveniences of a vague and unprecise formula, which would be obligatory in form, but not as to its central principle.

In practice, international differences are usually complex and frequently change their aspect in the successive phases into which they pass. In consequence, it might be very disagreeable for a State, if one thought of forcing it to submit to arbitration one point or one phase of the problem, discussed at the moment chosen by its opponent. In case obligatory arbitration were not provided for in a positive manner in the Convention and in case it were necessary to confine oneself to a general formula of negative nature, he would give preference to the proposition of Mr. MÉREY, which expresses only a desire and does not even present the appearance of an obligation.

His Excellency Mr. **Asser** wishes to correct a misunderstanding. In principle he approves the Portuguese proposition, and would be happy if an understanding could be reached. He has merely desired to point out a gap in it.

In answer to the remarks of Mr. FUSINATO, his Excellency Mr. ASSER declares that a distinction must be made. In treaties there figure obligations which the States themselves must fulfill; for instance, stipulations concerning rogatory commissions; it is evident that the international court will have an indisputable authority to interpret such cases.

But if a State has obligated itself only to give legal force to certain conventional provisions, why should not a judge have the same right of interpretation as he has for other national laws?

At all events, his Excellency Mr. ASSER believes that it is necessary to settle this question expressly.

Mr. **Guido Fusinato** replies that he is precisely in favor of the insertion in the Convention of a special clause in the sense indicated.

His Excellency Mr. **Mérey von Kapos-Mére** again taking up his proposition, sets forth that it completes the text of 1899 by a non-juridical recommendation. The Austro-Hungarian delegation is quite prepared to accept a stipulation which would apply obligatory arbitration to certain cases; but his Excellency Mr. MÉREY VON KAPOS-MÉRE, differing from his Excellency Mr. MILOVAN MILOVANOVITCH, does not believe that it would be logical to begin with an enumeration. According to him, it will be necessary to put a general formula before this enumeration.

Mr. **Kriege** states that he is willing to accept the proposition of his Excellency Mr. MÉREY regarding the addition of a new paragraph to Article 16.

The **President** reviewing the discussion points to the fact that two propositions are before the committee. On the one hand, the Swedish, Serbian, American and Portuguese projects affirm the principle of obligatory arbitration. On the other hand, the amendment of Mr. MÉREY proposes as a general rule a simple recommendation in favor of arbitration, excepting a subsequent enumeration of a certain number of special cases. This is the situation at the present time.

Mr. **Lange** agrees with this view and calls for a vote upon the principle of world obligatory arbitration, without prejudice to a subsequent examination of the Portuguese, Swedish and American propositions.

His Excellency Mr. **Léon Bourgeois** desires once more to give a summary presentation of the judgment of the French delegation. He states that he could not find any more appropriate terms than those used by his colleague from Russia. His Excellency Mr. MARTENS has referred to the Proceedings of [424] 1899 in which he took such a large share. But now, as then, the essen-

tial matter is as follows: Are there cases with regard to which the States may know in advance that neither their honor nor their vital interests are involved? His Excellency Mr. LÉON BOURGEOIS desires to express the satisfaction he feels in seeing that in 1907, he is, as in 1899, fully agreed upon this question with his Excellency Mr. MARTENS. He closes his remarks by calling again attention to the fact that in the mind of the French delegation, the fate of obligatory arbitration is intimately bound up with that of the Permanent Court.

Mr. **James Brown Scott** does not agree with this last declaration. In the mind of the delegation from the United States of America, these two propositions must not be very closely bound up together. One might readily accept the Court, while at the same time declaring against the list.

His Excellency Mr. **Léon Bourgeois** in a few words shows the necessary connection existing between the court and obligatory arbitration. Just complaint has been made because there are no judges at The Hague, but there is something even worse, he believes, than not having judges at The Hague; this would be to appoint judges and not refer cases to them for decision. This would be, however, the danger if obligation were rejected. It would to some extent be bidding defiance to the growing confidence of the world in arbitration. It is prudent, it is necessary to insure to the court not only judges, but clients as well.

His Excellency Mr. **Asser** states that certain States disposed, if necessary, to submit their differences to the Permanent Court, do not wish to bind themselves through an obligatory arbitration convention. By tying the two together, there would be danger of bringing both propositions to naught.

Mr. **James Brown Scott** repeats that the delegation from the United States of America would in no way make the success of the proposition regarding the Permanent Court depend on the fate of obligatory arbitration.

Mr. **Kriege** agrees with Mr. SCOTT and declares that the two propositions must be considered separately.

His Excellency Mr. **Alberto d'Oliveira,** on the contrary, shares the view of his Excellency Mr. LÉON BOURGEOIS. He states that public opinion looks upon the two questions as intimately related to each other and that obligatory arbitration is regarded as the more important of the two. It is a good thing to have a permanent court; it would be even better to have cases to submit to such a court. If we present a solemn proof of our distrust of arbitration, it will prove a bad recommendation for the court itself. I can well understand why one should wish here to establish a world tribunal, in a beautiful palace, with distinguished judges, but this does not suffice. We must also have the wish that it should operate, and in order to insure this result it seems indispensable to proclaim the principle of obligation. Let us be on our guard against showing but too clearly, not our fear of the tribunal, but our fear of justice.

His Excellency Mr. **Carlin** states with regard to the thought expressed by Mr. LANGE that it does not seem to him practical to adopt, in the first place, a formula recommending obligatory arbitration at the risk of having subsequently all special cases rejected.

It would seem more logical to vote in the reverse order. For in enumerating, in the first place, the special cases for which arbitration should be obligatory, the delegates might then, fully understanding the case, vote upon the principle itself.

In answer to a remark by Mr. LANGE, Mr. **Kriege** states that up to this

moment he has referred only to the general formula and that he has said nothing with regard to the matter of special cases of obligatory arbitration.

[425] Mr. **Lange** states that it would be important to know, above all things, if the committee is in favor of world arbitration.

Mr. **Kriege** and his Excellency Mr. **Hammarskjöld** call for an immediate vote upon the general formula.

His Excellency Sir **Edward Fry** agrees with the view expressed by Mr. LANGE.

The **President** states that it is important to fix clearly the import of the vote if the committee wishes, nevertheless, to take such a vote while the meeting proceeds; he wishes, above all things, to put the question to the satisfaction of all. He understands the fears of some in the presence of the reserve of Mr. KRIEGE; if the proposition of his Excellency Mr. MÉREY VON KAPOS-MÉRE were adopted and subsequently all proposed cases were rejected, we would not merely have done unfruitful work, but at the same time we would have prevented the partisans of obligatory arbitration from finding out their aggregate number.

Other delegates, on the contrary, fear that if we are even now to proceed to a vote upon the general formula of obligatory arbitration, the principle might be rejected, and that, therefore, we might not be able to discuss a list of cases admissible for all.

In the presence of this situation, the PRESIDENT proposes to begin an examination of the special cases and to put off the vote until such a time when an agreement shall have been reached with regard to a certain number of them.

His Excellency Mr. **Alberto d'Oliveira** proposes to postpone the vote to the time of the opening of the next meeting.

His Excellency Mr. **Milovan Milovanovitch** supports the motion of the PRESIDENT. He feels that the decision taken by the committee with regard to the list of obligatory arbitration cases will have an influence upon the vote of several delegations in respect to the general formula. He adds that if the cases of obligatory arbitration are numerous, a general formula will seem useless; if, on the contrary, their number is small, he shall refuse to sign a general formula of that kind.

His Excellency Mr. **Martens** restates that to his mind, it is essential to know if the committee does or does not accept obligatory arbitration, properly speaking, for a certain number of definite cases.

Mr. **Kriege** does not disagree with the view just expressed, but he does not see any obstacle to taking a vote upon the general formula.

The **President** does not share the view just expressed by Mr. KRIEGE; he believes, moreover, that the vote upon the general formula might depend upon the vote on the list of special cases of obligatory arbitration.

After an exchange of views, the discussion upon this matter is adjourned to Saturday forenoon, August 10, at 10 o'clock.

His Excellency Mr. **Ruy Barbosa** makes the following declaration:

In view of the result of the vote upon the Brazilian proposition in the course of the last meeting of this committee, and in order that no one might harbor any doubts as to the stability of certain principles essential to the sovereignty of nations, which no Government could renounce, the Brazilian delegation in the name of its Government, desires to state, for the purpose of removing any and all misunderstanding with regard to the meaning and scope of its acts, that in

voting any formula whatever of obligatory arbitration, it means to reserve always, expressly or implicitly:

In the first place, the right to have recourse to good offices or to mediation if necessary;

[426] In the next place, the duty of not submitting to arbitration matters pending before our tribunals or adjudicated by their decisions.

This last point with which we have already dealt in the last meeting, is developed in the following note:

In the enthusiasm which carries the minds toward international arbitration, we meet with certain dangerous opinions, certain regrettable dispositions against which we should be on our guard, for by denaturing that magnificent institution, they would have the result of increasing the causes of irritation and the germs of conflicts among the peoples, instead of relieving their relations and of inspiring them with confidence in that instrument of international conciliation.

One of these departures from the wisdom which is necessary for the organization and for the success of this reform is, in our judgment, the exaggeration which means to deflect in favor of arbitral courts matters submitted by the law of the country to the national courts, or to submit the decisions of the national courts to a foreign revision of arbitration. No one can imagine that a nation capable of defending itself against the powerful nations, would put up with this stain placed upon its courts. It could be conceived only with regard to weak countries of which it is said, in a manner of disparagement, that their courts do not inspire confidence among the other States.

I do not know, and I do not care to know, if this is true with regard to any civilized State. But in admitting that it is true, it is regrettable that nationals of countries advanced in civilization, where the laws rule and where justice is sure, should sojourn in such dangerous countries. Most often they take the risk of going thither only to seek their fortune, being well aware of the dangers to which their temerity exposes them. It is quite necessary that they should bear the penalty for such temerity, and, whatever it may involve, it is impossible to discover therein a reason warranting the threatening of other States whose courts are respectable, with a weapon susceptible of causing the greatest iniquities in the hands of an international force. If there are nations whose plane of judicial institutions is low, they form, fortunately, a small minority. The rest have capable courts. In my country, which I include among the latter, the magistrates do not hesitate in rendering decisions against the Government of the States or of the union, in favor of individuals or of private corporations. The principle of the responsibility of the State towards individuals for contract and extra-contract debts, combated so strongly in Europe, where the interests of the Governments oppose it with a mass of precedents and authorities, hitherto almost invincible, even in the farthest advanced and most liberal countries, has long since triumphed among us. Established upon this principle, which is one of the most valuable conquests in the juridical domain, a copious and ever new jurisprudence guarantees there, in a most remarkable way, the rights of the individuals; and it is especially the foreigners who benefit the most by this favorable institution, frequently attested to by the notable records of our magistracy.

But these are matters of fact which I might omit, in order to confine myself to those of law, since we are dealing only with rules to be established for the

relations between sovereign States. That is the main point of view, and from this point of view it would be absolutely inadmissible to constitute an international court, that is to say a foreign court, into an instance for the revision of cases adjudicated by the courts of an independent country. Let no one object to what I have just said by stating what is being planned with regard to matters of maritime prizes, for these questions are essentially of an international character, to such an extent that the national judges will continue to
[427] intervene, under the proposed reform, only by way of compromise, in a state of things destined to disappear in a future now foreseen by everyone.

Matters are entirely different in questions of purely private law that deal with nationals or with foreigners. As to these, to require that certain disputes be decided by the national courts, and to admit at the same time that the decisions of these courts should be submitted to an international court, would mean to renounce the inalienable prerogatives of the sovereignty of the nations. As regards the countries of Latin America nothing more humiliating could be imagined. We are, therefore, fully in accord with the declaration of Switzerland, that she does not admit arbitration upon matters already settled by decisions of the courts of the country.

Revision of decisions by foreign judges or by foreign tribunals is absolutely irreconcilable with the independence and honor of an organized State.

Furthermore, this new instance, necessarily reserved for foreigners, would insure to the latter a privilege of supreme importance with regard to the subjects of the State degraded by such a régime.

It is not disputed that the Government of a sovereign country, in its own interests, or yielding to reasons of a political nature, may seek or accept compromise with the foreign plaintiff, and agree to submit the matter to arbitration, if circumstances counsel it to such a course, and if the laws of the State were not opposed thereto, with legislative authorization, or without it, in conformity with the national law, provided the national courts have not been appealed to. But after the decision of the juridical power it would be impossible to nullify the sovereign authority of it by disregarding the force of the thing adjudicated.

We are not unaware of the doctrine, quite current among internationalists, which in this matter enters an exception for denial of justice, a reservation which is, moreover, rather elastic, and an abuse of which would not be and has not been difficult. But the clear meaning of this doctrine is that in matters of this kind, the Government to whom the claim is addressed, must give access for diplomatic parleys, when negotiating within the field of compromise. It must, however, not be forgotten that the case would then be from Government to Government, without any bond of general or permanent obligation, and without any conventional stipulation; and in my country, nothing of all this could have any effect except by means of the examination and of the acquiescence of the national Congress in each particular case.

Furthermore, international claims based upon alleged denial of justice have most generally been but the means of pressure of the great Powers against the countries of Latin America not strong enough to resist their demands. This we could easily prove by examples certified to upon the testimony even of European publicists.[1]

[1] TCHERKOFF: *Protection des nationaux résidant à l'étranger*, Paris, 1899, p. 288.

But absolutely repugnant to the Brazilian Government is the humiliating and offensive weakness of sanctioning against our courts and against our judges a suspicion not warranted by the facts, and of imposing this stigma of infamy upon them by admitting in an express and solemn manner, into the text of a treaty with another nation, and in the present hypothesis with all nations, the eventuality of a denial of justice. Our Government would never do this thing, even if it had the power, which our legislative chambers would undoubtedly never confer upon it. A treaty with this clause would never have the slightest chance of being ratified.

But even though our Government should desire to do so, it has not the power to carry out such a desire. This power is denied it by our constitution which confers it neither upon the President of the Republic nor upon the national congress. We obey a rigid constitution, modeled after that of the United [428] States of America in which the powers of each branch of the Government are defined in a manner that cannot be overcome. It withholds obligatory force from every act of any power whatever which goes beyond the scope of its functions. Upon the federal courts it imposes the duty of sanctioning disobedience to the laws that contravene the constitutional provisions. Finally, in defining the competence of these courts, it reserves in its Article 59, to the federal supreme court, the original privative jurisdiction of deciding the disputes and claims of foreign countries and of Brazilian subjects against the Union and against the States, and by its Article 60, to the federal magistracy in the two instances of its courts, the power of settling, not merely disputes between foreign States and Brazilian subjects, but even suits brought by foreigners and based either upon contracts with the Brazilian Government, or upon conventions and treaties between the latter and other Powers.

In the presence of these peremptory texts, it is, therefore, evident that under our basic laws neither the Government nor the legislature has the power either of arrogating unto itself jurisdiction in these matters or of denying the courts the right to decide matters of this nature, submitted to their judgment, or *a fortiori,* of reviewing decisions in reference thereto.

This being incontestable in view of the Brazilian constitution whose provisions I have just now outlined, if the obligatory arbitration convention were to contradict them explicitly and implicitly, my Government could never authorize me to subscribe to that convention. This would be beyond its powers and mine.

It would be impossible for it to betray the constitution of the country. Neither the concert of the nations, even though it were unanimous, nor the supreme interests of peace have the right to demand of a Government that it disregard its constitutional duties.

In consequence, if you were to accept the proposition to include in obligatory arbitration questions that have been adjudicated by courts of justice or are pending before them, it would be with the previous knowledge and certainty of excluding from it Brazil, and along with it, all the States where the same authority is recognized to the courts of justice.

The meeting closes at 5:30 o'clock.

[429]

SEVENTH MEETING

AUGUST 10, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10 o'clock.

The minutes of the fifth and sixth meetings are adopted under reservation of rectifications that might be presented to the secretariat.

The **President** believes that, in conformity with the usage introduced in 1899, the honorary presidents and the president of the drafting committee are always entitled to follow the labors of the committee of examination.

The committee agrees to the view just expressed by the PRESIDENT. In consequence, his Excellency Baron MARSCHALL VON BIEBERSTEIN and Mr. LOUIS RENAULT are present at the meeting.

The PRESIDENT proposes to take up the examination referred to in the meeting of August 6 of the enumeration of the special cases susceptible of being settled by means of obligatory arbitration. Only after this preliminary study, voting upon the principle itself of obligatory arbitration shall be proceeded with. (*Approval.*)

Mr. **James Brown Scott** declares that the delegation from the United States of America is entirely favorable to the principle of obligatory arbitration, but that up to this time it has received no instructions regarding the list of special cases. Nevertheless, if an agreement is reached by the committee itself, the delegation will not fail to call for supplementary instructions.

The **President** proposes to take up the study of the different cases of obligatory arbitration, beginning with those included in the Portuguese list [1] which seems the most complete.

The committee agrees to this view and begins the discussion of paragraph 7 (treaties of commerce and navigation).

His Excellency Mr. **Alberto d'Oliveira** is granted the floor.

He reminds the members that the movement in favor of the introduction of the compromissary clause into these treaties is old. It is already found in numerous treaties of commerce and it seems that there could be no seri-
[430] ous objection to its being inserted in a universal treaty. But it is important to secure a text which will clearly state that we are dealing exclusively with juridical differences concerning the interpretation of these treaties. The general principle in this matter should be as follows: the solution of a juridical difference must be juridical.

His Excellency Baron **Marschall von Bieberstein** states that this distinction is not formulated in the Portuguese proposition.

Indeed, the Portuguese proposition refers to juridical differences *or* to dif-

[1] See annex 19.

ferences relative to the interpretation of treaties. It seems therefore, also applicable to differences of a political nature.

His Excellency Mr. **Alberto d'Oliveira** acknowledges that, indeed, this text taken, moreover, from arbitration treaties actually in force, is not perfect and had repeatedly given rise to criticisms. He would gladly accept another wording.

Mr. **Guido Fusinato** calls the attention of the committee to the importance of this question.

The practical value of a list of questions to be submitted to obligatory arbitration, according to the Portuguese proposition, consists in the engagement of the parties not to avail themselves, in this case, of any exception. Even if, in this case, a reservation is introduced for the clauses of *a political nature,* Article 16 *b* will lose all of its value. For, in case of necessity, who should decide whether or not this or that clause of a treaty of commerce is of a juridical or of a political nature? Shall it be the party itself? Then we would produce a situation identical with that foreseen in Articles 16 and 16 *a*. Shall it be the arbitrator himself? We of the Italian delegation do not ask for any better answer, for Italy has accepted this solution in its general arbitration treaty with Peru; but is the Conference ready to accept it? . . .

His Excellency Mr. **Alberto d'Oliveira** suggests that it might perhaps be possible to add to the words *"treaties of commerce and navigation,"* these other words: *"in so far as they refer to certain matters enumerated hereinafter."*

His Excellency Mr. **Ruy Barbosa,** although favorable to the Portuguese proposition, finds in it points where it might be amended and advantageously reworded.

With regard to the two matters with which the committee dealt this day, he shares the view of Baron Marschall von Bieberstein and of Mr. Alberto d'Oliveira himself, with regard to the clause bearing upon the "differences of a legal nature or differences relative to the interpretation of treaties." This clause is apparently conceived in terms which are too inclusive. The questions of interpretation of treaties, that is to say, of interpretation of contracts, are by their very nature questions of a legal nature. It is law which furnishes the hermeneutical rules and also the principles by means of which conventions between individuals or between States are interpreted. Therefore, in speaking of differences of a legal nature, those concerning the interpretation of contracts are implicitly referred to as well. But this is but an inoffensive pleonasm.

The other matter is of more serious consequence. The enumeration under Article 16 *b* of the Portuguese proposition has no other purpose than to forbid in the cases designated in it, an appeal to the reservation concerning the essential interests. Now, we begin to realize that even these cases permit of inevitable reservations of a political nature and are none other than those indicated in the text of Article 16 under the name of essential interests. But again, if this political reservation also invades the sphere of Article 16 *b,* that is to say, if it becomes applicable to matters which it has been sought to remove from
[431] its influence, the purpose of the enumeration in this article has absolutely failed of its mark. It would, in consequence, be necessary to eliminate the items of the article susceptible of such reservation, or to restrict its contents somehow, and in such a manner that it will include only cases for which reservations might not be invoked for the purpose of avoiding the obligation to arbitrate.

Any question of interpretation is legal, even independently of its nature; that is the real difficulty.

His Excellency Mr. **Hammarskjöld** believes that the exclusion of political matters must appear in the statement of the general principle and not in the enumeration of the special cases. According to him, it would be necessary to determine the matters to be included in an obligatory arbitration treaty, rather than to designate them as a whole by the vague formula of "legal questions." For instance, one might stipulate obligatory arbitration for treaties of commerce and of navigation "in so far as they concern the rights of foreigners to own real estate," etc.

His Excellency Mr. **Milovan Milovanovitch** states that although the treaties of commerce include at times provisions of a political nature, their interpretation is, none the less, always of a legal nature. At the same time it is true that the essential interests may be affected by certain provisions of these treaties, and that, from this point of view, one may understand a hesitation to submit them, for all there is included in them, to obligatory arbitration. The interpretation of treaties of commerce constitutes one-half of that which one might have to submit to arbitration; it is, therefore, worth while to take time to give it consideration. Because of this, his Excellency Mr. MILOVAN MILOVANOVITCH agrees to the proposition just made by his Excellency Mr. HAMMARSKJÖLD. In passing, he adds that one might also insert into the general treaty a clause giving permission to the parties that conclude a treaty of commerce, to remove certain matters from obligatory arbitration. Thus, arbitration would be the rule for the interpretation of treaties of commerce, with the exception of matters explicitly reserved.

His Excellency Baron **Marschall von Bieberstein** believes that it will be very difficult nowadays to define that which is political and that which is not political; the word "political" is as elastic as the words "honor," "independence," or the expression "vital interests," if not more so.

In these days, international life is so intense that all questions are related to one another, and, in consequence, become complex. Mr. FUSINATO was quite right in wondering who might be judge in determining the character of a difference. The character may be juridical, political, or economic; and how shall we, at times, distinguish between the economic character and the political character? If a State calls for arbitration and another refuses it by taking refuge behind political reasons, what will be the outcome of the dispute? It is not possible, on the other hand, to leave to the arbitrator the decision of a matter so grave that in reality the future itself of the institution of arbitration is at stake.

His Excellency Mr. **Hammarskjöld** gives point to the matter by saying that it is the general formula which is to determine if political questions are involved, but, in enumerating the cases of applications, it is necessary to give only the mere nomenclature of the matters susceptible of obligatory arbitration without specifying anew their exact nature. In the formula, the reservation; in the enumeration, the matters.

His Excellency Sir **Edward Fry** observes that to find out if the enormous mass of treaties of commerce concluded by England with other Powers, does not contain clauses involving the essential interests, while at the same time of a legal nature, it would be necessary to study all of them. Such a task would

evidently be tremendous; it would require much time and the assistance of all the interested English ministries.

[432] His Excellency Mr. **Martens** calls attention to the danger lurking in vague formulas which may be interpreted in a contradictory sense and prepare disputes instead of preventing them. It is of importance to reach an agreement, in the first place, upon the principle:

> Are there, or are there not cases in which the essential interests of the States are not involved?

When this question shall once have been answered in the affirmative, then only will arise the question as to whether or not treaties of commerce come within this class.

His Excellency Mr. MARTENS does not believe that all treaties of commerce can be submitted to obligatory arbitration. It will, therefore, be our business to define well those *questions* susceptible of being submitted to obligatory arbitration. We shall have to elaborate an exact list of cases—such as the enumeration of merchandise, customs conflicts, etc.

His Excellency Mr. **Alberto d'Oliveira** is glad to see that Mr. MARTENS is in such complete agreement with Mr. HAMMARSKJÖLD and with himself. For it is better to submit to arbitration only matters exactly defined, and not treaties in a general way. He has not given up the hope that Sir EDWARD FRY will likewise accept this system which will avoid the necessity of a complete revision of all the treaties of commerce concluded by Great Britain.

His Excellency Mr. **Léon Bourgeois** takes the floor in his quality as first delegate from France.

He is happy to see that the committee has begun its examination with the paragraph of the treaties of commerce which contains, in fact, all the problems to be settled.

It is clear, as has been pointed out by Baron MARSCHALL and by Sir EDWARD FRY, that treaties of commerce cannot, each as a whole and without detailed examination, be submitted to obligatory arbitration. On the other hand, Mr. FUSINATO is right in saying that we must not refer to the future arbitrator the task of deciding if this or that comes within the scope of arbitration. Let us not ourselves, in advance, create causes of disputes. It is we who are here present who must state, who must decide whether or not a certain question is of a juridical nature. Mr. MARTENS has pointed to the danger there is in vague formulas.

His Excellency Mr. LÉON BOURGEOIS believes that it is the very task of the committee to determine if treaties of commerce contain a certain number of provisions of an essentially legal nature which do not involve the political interests of the States. As examples of such provisions, one might point to those settling customs tariffs, the rights of foreigners, etc.

After an exchange of views, the **President** requests their Excellencies Messrs. HAMMARSKJÖLD, LUIS DRAGO, ALBERTO D'OLIVEIRA and MARTENS to prepare a table of the provisions of treaties of commerce which in their judgment might be of a legal nature, or, at least, might not be of a political nature. (*Approval.*)

His Excellency Mr. **Luis M. Drago** expresses doubts as to the practical possibility of separating political and legal questions from one another.

The nature of a clause varies with the circumstances. Is a war of tariffs of an economic or of a political character? May not the application of the clause of the most favored nation be political?

Mr. **Guido Fusinato** reads aloud two types of *compromis* clauses, one of which is found in Article 18 of the treaty of commerce between Italy
[433] and Switzerland of July 13, 1904, and the other in Article 15 of the treaty between Italy, on the one hand, and Austria-Hungary and Germany on the other.[1]

His Excellency Baron **Marschall von Bieberstein** remarks that there are stipulations which in theory are legal but become political at the time of the dispute.

Pursuing the examination of the table, the committee passes to paragraph *b* of Article 16 *b* of the Portuguese proposition [2] (Conventions regarding the international protection of workmen).

His Excellency Mr. **Alberto d'Oliveira** reminds the members of the fact that the question had been brought up at the time of the Berne Conference in 1906 for labor protection. Great Britain had at the time proposed a clause submitting the matters of interpretation to obligatory arbitration. This proposition was incorporated in another one which proposed the creation of an international advisory commission. This second proposition did not receive a sufficient number of votes; it remained finally in the form of a *vœu*, and the first proposition followed its fate. Mr. D'OLIVEIRA feels convinced that if it had been brought up for special discussion, it would have been adopted unanimously.

The Portuguese proposition does not, therefore, constitute a novelty.

His Excellency Baron **Marschall von Bieberstein**: Before entering into a discussion of the details of the list of conventions contained in the second part of the Portuguese proposition and before inscribing therein the principle of obligatory arbitration, I believe it useful and necessary to settle, in the first place, an important previous question: What will be the effect of arbitral awards? The matter is of great importance, for instance, in controversies over the interpreta-

[1] ARTICLE 18. If disputes should arise on the subject of the interpretation of the present treaty, including annexes A to F, and one of the contracting Parties asks that it be submitted to the decision of an arbitral tribunal, the other Party should consent thereto, even for the preliminary question of ascertaining whether the dispute has relation to the interpretation of the treaty. The decision of the arbitrators shall have obligatory force.

ARTICLE 15. If there should arise between the high contracting Parties a difference respecting the interpretation or application of the tariffs A and B annexed to the present treaty, including the additional provisions respecting these tariffs, or on the actual application of the most-favored-nation clause regarding the execution of other conventional tariffs, the dispute, if one of the high contracting Parties so requests, shall be settled by means of arbitration.

For each dispute the arbitral tribunal shall be constituted in the following manner: each of the high contracting Parties shall appoint as arbitrator from among its *ressortissants* two competent persons and they shall agree on the choice of an umpire who is a *ressortissant* of a friendly third Power. The high contracting Parties reserve to themselves the right to designate in advance, and for a period to be determined, the person who should discharge, in case of dispute, the duties of umpire.

When the occasion arises and under the reservation of a special agreement to this effect, the high contracting Parties shall also submit to arbitration the differences which may arise between them on the subject of the interpretation and the application of other clauses of the present treaty than those referred to in the first paragraph.

See annex 66, No. II, 5 to 8.

[2] Annex 19.

tion of a clause of a treaty signed by several States, such as universal conventions. The arbitral decision will, no doubt, have legal force between the two parties, but what will be its effect as regards the other signatory States? Will it be *res inter alios acta?* Such a solution would result in a series of contradictory decisions, and it would not fail to put an end to universal treaties.

The reverse solution which would make the decision obligatory with regard to all the signatory States, is likewise impossible. Would it be more practical to apply in this matter the Roman *litis denunciatio?*

[434] By way of analogy, one might come to an understanding that before having recourse to arbitration, Powers in controversy should notify their dispute to the other States which might have the right to intervene. The arbitral decision rendered in these conditions, would be obligatory for all, even for the States which might not have availed themselves of their right of intervention. However, this solution would present great complications in the matter of a world treaty.

The **President** believes that the moment has come to read aloud a proposition which he has received from Mr. FUSINATO, concerning the matter which has just been brought up; it reads as follows:

> The arbitral award concerning the validity or the interpretation of a Convention shall have the same force as the Convention itself, and shall be equally well observed, excepting from it, however, respect for the rights already acquired at the time when the award shall have been rendered.
>
> If the arbitral award concerns the validity or the interpretation of a Convention between several States, the Parties between whom the award has been rendered, shall be obliged immediately to communicate its text to the other contracting Parties. If, by a three-fourths majority, the contracting States declare their acceptance of the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all. In the contrary case, the award shall be valid only between the Parties in dispute and only with regard to the case which has been the object of the dispute.

His Excellency Mr. **Asser** was glad to hear the remarks of Baron MARSCHALL, and believes that he can make answer thereto by reading Article 56 of the Convention of 1899, introduced upon his motion, and the statement of the reasons which prompted it, recorded in the Proceedings of the First Conference.

> The award is binding only on the parties who concluded the *compromis*.
>
> When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter notify to the former the *compromis* they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

He adds, that in his judgment, the proposition of Mr. FUSINATO will tend to fill a gap in this article.

Mr. **Guido Fusinato** in a few words presents a defense of the substance of his proposition. The difficulty with regard to the application of Article 56 of the Convention of 1899, especially for world conventions, lies in the fact that it leads to the intervention in the controversy of all the signatory States.

He believes that one may regard the totality of the signatory States of a convention, with regard to that which constitutes the object of the Convention itself, as a sort of new organism; and he suggests giving to the three-fourths majority of these States—without insisting upon this quorum—the power of rendering an interpretative arbitral decision obligatory for all.

In case the majority were not secured, the decision would be obligatory only as between the States in dispute and solely with regard to the object of the dispute.

The **President** reads aloud the proposition which he has received upon this very question from his Excellency Baron GUILLAUME, in the name of the Belgian delegation:

> Difficulties of interpretation or application of treaties to which more than two Powers have adhered, cannot form the subject of arbitral procedure without previous consent of all the Powers signatory or adhering to these treaties, to be given in each case.

[435] His Excellency Baron **Guillaume** remarks that this proposition conforms to the thought expressed by his Excellency BARON MARSCHALL VON BIEBERSTEIN. The solution proposed by Mr. FUSINATO does not seem sufficient to him inasmuch as it still permits one-fourth of the signatory States to interpret in their own way a clause of an international treaty.

Mr. **Louis Renault** calls the attention of the committee to Article 7 of the proposition of the French delegation concerning summary arbitration procedure,[1] reading as follows:

ARTICLE 7

> If the dispute relates to the interpretation or application of a convention between more than two States, the parties between which it has arisen shall notify the other contracting parties of their intention to resort to arbitration and advise them of the arbitrators chosen by them.
>
> The parties thus notified shall have the right to name arbitrators to form the tribunal in addition to the arbitrators designated by the Powers which have made the notification. If, within a month after this notification, any party has not designated an arbitrator of its choice, that Power will be understood to accept any decision which may be rendered.
>
> The umpire shall be designated as indicated by Article 1, except that where there are more than five parties to the dispute, the restrictive clause relating to the nationality of the umpire shall not be applied. The umpire shall have the deciding vote in case of an equal division.

Mr. LOUIS RENAULT does not believe that the difficulty with which the committee is concerned is a decisive reason against obligatory arbitration; there is no doubt that there may follow contradictory decisions; but can obligatory arbitration be held responsible for such a situation? Shall we permit that a State which complains and is suffering may not invoke its right to arbitration because

[1] Annex 9.

other States refuse their adhesion to the recourse to arbitral justice? For conventions relating to the protection of labor, we must have uniform application for all countries. Without this provision, the industries of certain countries may be in a state of inferiority with regard to those of certain other countries. In controversial matters, arbitration is the only way of obtaining uniformity of application.

His Excellency Mr. **Hammarskjöld** shares the view taken by Mr. Louis Renault and believes, moreover, that the difficulty by which they are confronted, must not be regarded as an argument against obligatory arbitration.

His Excellency Baron **Marschall von Bieberstein** answering his Excellency Mr. Asser, states that he is perfectly acquainted with Article 56 of the Convention of 1899. This provision is excellent for treaties concluded between, say, ten States or so, but seems quite impracticable for a world convention. Its application would not fail to cause regrettable delays, at times delays of a year at least. As regards the proposition of Mr. Fusinato, his Excellency Baron Marschall states that it leads to a sort of universal ballot well-nigh impossible. On the other hand, it would present the inconvenience, in case the three-fourths majority were not secured, of establishing numerous diverging interpretations which would have the result of terminating universal treaties.

The **President** emphasizes the difficulty which the committee is to settle. Two solutions are possible. The first is the one proposed by Mr. Fusinato: consultation of all the States upon the decision rendered. If a majority of the Powers accepts it, the interpretation will be official, and obligatory for all. But if, on the contrary, a majority of the States rejects the decision, the latter will bind only the two States in dispute, for the past and solely for that par-
[436] ticular case. In such case the question is likewise settled; the ballot has shown that the Powers give to the dispute an answer different from that of the arbitrators.

His Excellency Baron **Marschall von Bieberstein** is of opinion that a decision rendered as between the two States should be binding upon them not merely for the past, but even for the future.

His Excellency Sir **Edward Fry** calls the attention of the committee to the proposition of the United States of America which provides for certain reservations to obligatory arbitration, especially the reservation of the interests of third Powers. He believes this provision to be just and of a nature to remove every difficulty.

The **President** takes note of the observation just made by his Excellency Sir Edward Fry.

His Excellency Mr. **Martens** believes that the question of deciding whether or not States in controversy about the interpretation of a universal treaty should notify their dispute to the other States, must be left an open question; without waiting for an answer, the Powers may always appeal to an arbitral tribunal. The decision rendered will bind only the two and must have no effect as regards the other States. Undoubtedly, adds his Excellency Mr. Martens, it will not fail to exercise a moral influence upon the chancelleries; but it is the only influence which I believe it can have upon them.

His Excellency Mr. **Alberto d'Oliveira** acknowledges the importance of the objections presented with regard to the introduction of obligatory arbitration in universal conventions, but he does not believe that they are especially directed

against obligatory arbitration. The difference in the interpretation which is feared may even present itself under the rule of Article 56, which is now in force.

The introduction of the principle of obligatory arbitration will, on the contrary, result in giving to the Powers a pledge of more justice and of an interpretation conformable to the truth. For the many means admitted nowadays for settling differences of interpretation, it will substitute the sole remedy of arbitration. If a first decision has not been unassailable, the next one will correct it.

The **President** states that the objection presented bears not merely upon all universal treaties, but upon all collective treaties.

His Excellency Mr. **Milovan Milovanovitch**: Permit me to lay before you an idea which was suggested to me by the remarks of Baron MARSCHALL. I believe it is impossible to state that an arbitral decision rendered as between two States, has no force in future for these States themselves, and this solely because it has not secured the consent of the rest of the States. This would take away all importance from the principle of arbitration. It is proper that the matter adjudicated should remain adjudicated for the parties in controversy. The proposition of Mr. FUSINATO has for its object to avoid a series of different arbitral judgments upon one and the same matter; for this reason it submits the arbitral decision to the approval of the Powers which have not intervened, and if the latter do not reject it by a majority vote, it becomes a matter adjudicated with regard to all the signatory States.

Gentlemen, I propose above all firmly to establish the obligation to notify to all the States the recourse to arbitration, for it is proper, so it seems to me, to give information of it to all those who might have a special interest in the matter brought to discussion and who might desire to intervene to uphold their cause; so far as they are concerned, this intervention is very important, for the reason that later on the arbitral decision may be imposed upon them as the result of the vote.

Mr. **Heinrich Lammasch** points to the fact that Article 56 already contained this provision. If it is combined with the proposition of Mr. FUSINATO, the duty of notification will be clearly established.

[437] His Excellency Mr. **Carlin** approves of the view expressed by his Excellency Mr. MARTENS—the decision rendered would have effect only with regard to the States directly in controversy. The same question brought up consequently between two or several other States would still be submitted to arbitration. It is better to risk having several diverging decisions upon the same matter than to renounce the principle itself of arbitration, because of the difficulties involved in the solution of the question as to the effect an arbitral decision will have upon decisions to be rendered subsequently, and upon the States having signed the same convention, but not directly interested in the particular case.

His Excellency Baron **Marschall von Bieberstein** acknowledges the logic of the remarks of their Excellencies Messrs. MARTENS and CARLIN, but these seem but to confirm his apprehensions. Take, for instance, the State A in dispute with another State B; the two Powers have recourse to arbitration; B wins its case. A short time afterwards, the same State A, in order to settle a new dispute upon the same question with the State C, has recourse to another arbitral

court which settles the same dispute in a different manner. Shall it apply the same clause of the treaty in two different ways?

Baron MARSCHALL believes that if the principle of obligatory arbitration is to be inserted in a convention, it is proper to adopt measures that will prevent the contingency that in its application it may not lead to the gradual dissolution of all universal treaties.

Mr. **Louis Renault** believes that the logical conclusion of the remarks of Baron MARSCHALL would not merely lead to the suppression of obligatory arbitration, but also to that of an optional arbitration under whose *régime* the difficulties become even more numerous.

His Excellency Baron **Marschall von Bieberstein** does not at all agree with this view.

The optional recourse to arbitration depends upon the will of the States. They act in the full freedom of their sovereignty and are alone responsible for their acts; on the other hand, by imposing obligatory arbitration, the Conference by that very fact makes itself responsible for the untoward consequences to which it might lead, and it must, at the same time, find a means of solving the difficulties to which the principle might give rise.

His Excellency Mr. **Carlin** reminds the members of the fact that obligatory arbitration has been agreed upon in the principal convention of the Universal Postal Union.[1] With regard to the international convention for the transportation of merchandise by rail, this Conference provides for optional arbitration in its Article 57, No. 3.

His Excellency Baron **Marschall von Bieberstein** replies by stating that this recourse to arbitration in the convention for the transportation of merchandise is not obligatory.

His Excellency Mr. **Mérey von Kapos-Mére** believes that all difficulty would be overcome by the adoption of two principles. The first would have for its object to limit the effect of the arbitral decision to the two States in dispute; the second would consist in stating *expressis verbis* that no arbitral decision is of an interpretative nature and that it imposes a decision only for the special case and by the States involved therein.

His Excellency Baron **Marschall von Bieberstein** believes that the question would be simplified if one could indicate a definite court for the settlement of such disputes.

The **President** desires to pay homage to the committee of examination by emphasizing the interest of these discussions which are the prelude and the necessary preparation for the progress which we seek to attain. He proposes to his Excellency Mr. ASSER, to Mr. FUSINATO and to his Excellency Mr. MÉREY to come to an agreement among themselves and to present at the next meeting a solution to the question raised by Baron MARSCHALL.

[438] His Excellency Sir **Edward Fry** again calls the attention of the committee to the fact that among the treaties contained in the report of the administrative councils, eighteen treaties contain the stipulation that arbitration is not obligatory when the difference involves interests of third Powers. He believes that this clause is necessary and states that he perceives less inconvenience in the possible divergence of judgment upon the system of optional arbitration than in the difficulties which will arise from the opposite system.

[1] Article 23.

His Excellency Mr. **Milovan Milovanovitch** suggests declaring that the previous notification must be addressed to all the signatory States which shall have the right to intervene if they deem proper to do so. As to the arbitral decision, without its being applicable to the States which have not been involved in the dispute, it will be of general importance in this sense that it must be applied to the States in dispute not merely in their mutual relations but also in their relations with all the other States.

His Excellency Baron **Marschall von Bieberstein** desires to bring still another important question to the attention of the committee.

He recalls that treaties frequently contain stipulations compelling the one or the other party to resort to consequential administrative or legislative measures.

No difficulty arises with regard to administrative measures which may have to be taken. But when confronted by the necessity of taking certain legislative measures, the Government of a State may be confronted with a very delicate situation. For it may well be that in the presence of an arbitral decision demanding that a State reform its legislation, the latter may find it impossible to do so because of the resistance of a parliament. The decision exists; it imposes an *ad faciendum* obligation which the State cannot fulfill. What is to be done? On the one hand, we have the obligation to carry out the arbitral decision; on the other hand, we are confronted by the impossibility of securing the legislation necessary for this execution. How are we to get out of this dilemma?

Mr. **de Beaufort**: It is inherent in all arbitration. Let us add these words: "*In so far as lies within its power.*"

The **President** admits the great interest of this question; but he believes as Mr. DE BEAUFORT thinks, it has a much wider scope and arises likewise in those cases not involving optional arbitration. At the time the *compromis* is signed, arbitration becomes obligatory between the two parties, and yet, neither of them can be sure in advance of obtaining the necessary ratifications; one cannot begin by assuring oneself of the previous approval of parliament; this incertitude must, of necessity, be admitted.

His Excellency Baron **Marschall von Bieberstein** again points to the responsibility of the Conference in this matter; if it desires to impose obligatory arbitration, it shall be its duty to solve the difficulties to which it might give rise.

Mr. **Heinrich Lammasch** declares that the difficulty has been encountered at other times. He recalls that Austria-Hungary, signatory of the Sugar Convention was compelled by the Brussells Convention to modify its municipal legislation. He believes that, no more than an individual, a State is expected to do the impossible, and that it will have done its duty in doing what it can to change its legislation.

His Excellency Mr. **Asser** distinguishes between two possible kinds of engagements for the States in need of modifying their domestic legislation: (1) the State obligates itself to present a draft law; and in this case no difficulty can arise; and (2) if, on the contrary, it engages itself to have a law enacted, it will be prudent not to ratify the Convention before the law has been adopted.

[439] His Excellency Baron **Marschall von Bieberstein**, in reference to the remarks of Mr. LAMMASCH, wonders if it is well and to any good purpose to reach stipulations foreseeing arbitral decisions that impose impossible things.

Again he emphasizes the responsibility which the Conference will assume by indirectly creating a situation impossible for the States.

His Excellency Mr. **Martens** acknowledges that a parliament might always refuse to ratify a convention; but to his mind, one may regard the opposition of parliament to the vote of a draft law as a case of *force majeure*. In this connection he recalls the embarrassment of Governments when a parliament refuses to adopt a treaty which is sometimes signed in special circumstances. Thus, the general Act of the Brussells anti-slavery Convention of 1890, was accepted by the French parliament only by the rejection of ten or twelve articles concerning the right of search.

His Excellency Mr. **Luis M. Drago** believes, on the contrary, that a treaty must always be carried out and that no State may avoid fulfilling its provisions by invoking an obstacle of a domestic nature.

In the United States it frequently happens that a decision of the Supreme Court is submitted to an arbitral court. This decision must, nevertheless, be carried out in so far as is possible.

Mr. **Guido Fusinato** shares the view just expressed. He believes that it would be necessary to decide to impose obligatory arbitration for certain treaties, only for the future; all Governments may in this manner assure themselves of the dispositions of the legislative power before the exchange of ratifications.

The meeting closes at the hour of noon.

[440]

EIGHTH MEETING

AUGUST 13, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5:30 o'clock.

The minutes of the seventh meeting are adopted.

His Excellency Baron **Guillaume** (reporter) has the floor and reads aloud his report upon the first three parts of the Convention for the pacific settlement of international disputes.[1]

With regard to Article 10, Mr. **Heinrich Lammasch** proposes to put into the third paragraph: "*the languages*" instead of "*the language.*" [2]

Mr. **Fromageot** states that the Commission will use but *one* language and that before it the parties may possibly use *several* languages.

After an exchange of views between his Excellency Mr. **Martens**, Mr. **Heinrich Lammasch** and Mr. **Louis Renault**, the **President** declares that an understanding has been reached for the use of the expression: "*the language it shall use and the languages the use of which shall be authorized before it.*"

Mr. **Louis Renault** proposes to replace the words: "*delegates or special agents*" in the first paragraph of Article 14 by the words: "*special agents.*" [3]

[441] By using a double expression, it would seem that it is desired to indicate that we are dealing with two different rôles.

The proposition of Mr. Louis Renault is accepted.

[1] See vol. i, ninth plenary meeting, Annex D, pp. 397-413 [401-416].

[2] Article 10. International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language it shall use and of which the use shall be authorized before the Commission, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint assessors, the inquiry convention shall determine the mode of their selection and the extent of their powers.

[3] Article 14. The parties are entitled to appoint delegates or special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission.

With regard to Article 16, his Excellency Mr. **Asser** recalls that the committee has decided to put into the first paragraph of Article 16 *"secretary"* in the place of *"Secretary General,"* the latter title appearing to be too high. His Excellency Mr. ASSER believes that the simple appellation *"secretary"* is more appropriate.[1]

His Excellency Mr. **Martens** approves of the remarks of his Excellency Mr. ASSER.

Mr. **Fromageot** is of opinion that the rôle of the secretary general may be important and recalls the scope and the importance of the work with which this incumbent, at the time of the Hull inquiry, was charged. Furthermore, he may be called upon to serve as chief of several collaborators.

Mr. **Louis Renault** shares the view expressed by Mr. FROMAGEOT.

His Excellency Mr. **Asser** not objecting to having the wording of the Franco-British proposition[2] retained, the title *"Secretary General"* is accepted by the committee.

Mr. **Heinrich Lammasch** believes that the words *"or the Commission"* in the phrase *"in so far as the Parties or the Commission do not adopt other rules"* at the end of Article 17 should be omitted. It seems dangerous to grant to the Commission the right to depart from fundamental rules such as those contained, for instance, in Article 28, No. 3, concerning the minutes of the deposition of a witness, or in Article 35, relative to the nature of the report of the commission of inquiry. Furthermore, the proposed text would be hardly in harmony with Article 18 which attributes to the Commission only the right of settling the details of the procedure not provided for in the special Convention.[3]

Mr. **Guido Fusinato** does not perceive any inconvenience in retaining the words *"or the Commission,"* provided the word *"unanimous"* were added, thus expressing the thought that the Commission may depart from the ordinary rules of procedure if it unanimously decides to do so.

His Excellency Sir **Edward Fry** and the **President** support the opinion of Mr. HEINRICH LAMMASCH.

The proposition of Mr. HEINRICH LAMMASCH is put to a vote and is adopted by nine votes against two; the words *"or the Commission"* will be omitted.

Mr. **Louis Renault** wishes to draw the attention of the committee to the word: *"recommend"* in Article 17. We are dealing with rules of procedure for which the parties may substitute other rules. However, if the signatory Powers only *"recommend"* these rules, matters would be left in an uncertain light

[1] ARTICLE 16. If the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry.

It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the custody of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

[2] Annex 7.

[3] ARTICLE 17. In order to facilitate the constitution and working of international commissions of inquiry, the signatory Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties or the commission does not adopt other rules.

[442] if the parties do not desire to follow them and if the special convention of inquiry has not established other rules. Mr. LOUIS RENAULT proposes to put "*adopt*" in the place of "*recommend.*"

The **President** believes that from the rigid juridical point of view, Mr. LOUIS RENAULT is right.

His Excellency Mr. **Martens** prefers the word "*recommend*" as being more modest.

His Excellency Mr. **Asser** proposes the wording: "*shall be applicable.*"

Mr. **Guido Fusinato** declares that the report of his Excellency Baron GUILLAUME states in a clear manner the ideas which led the committee to choose the word "*recommend.*" He prefers to retain it.

Upon the motion of the **President**, a vote is taken upon the proposition of Mr. LOUIS RENAULT which his Excellency Mr. ASSER declares he will support. The result of the vote being a tie (five against five), the PRESIDENT thinks that under these conditions the wording should be left as previously adopted by the committee.

His Excellency Baron **Guillaume** brings the reading of his report to a close. It is loudly applauded. The **President** declares that this applause is the most eloquent expression of the gratitude of the committee for the very complete, very clear and excellent work of its reporter.

Upon the proposition of the PRESIDENT, the committee of examination C of the subcommission is organized. It shall be charged with the special study of arbitral procedure.

The committee designates Mr. HEINRICH LAMMASCH as its president, and as members: Mr. FUSINATO, Mr. LANGE, his Excellency Mr. ALBERTO D'OLIVEIRA, Mr. KRIEGE, Mr. FROMAGEOT, his Excellency Baron GUILLAUME and Mr. JAMES BROWN SCOTT.

His Excellency Mr. **Carlin** states that he will deposit with the bureau of the Conference a proposition from the Swiss delegation relative to obligatory arbitration.[1]

Special record is entered of the communication made by his Excellency Mr. CARLIN.

The next meeting is fixed for Thursday forenoon, August 15, at 10 o'clock.

[1] Annex 27.

[443]

NINTH MEETING

AUGUST 15, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10 o'clock.

The **President** proposes to the committee to accept as new members the vice presidents or their substitutes. (*Approval.*)

He wishes also to correct an error. During the last meeting of the committee, he requested Mr. HEINRICH LAMMASCH to preside over committee C; but he realizes that this honor was due to Mr. FUSINATO in his quality as substitute president of the subcommission. Therefore, he requests the latter to be kind enough to preside over committee C.

His Excellency Sir **Edward Fry** proposes to omit from Article 1 of the Portuguese proposition[1] the terms "concluded, etc." He believes that many difficulties would disappear if one were willing to establish the principle of obligatory arbitration only for the conventions "to be concluded." He then declares that he accepts, without discussion, No. 3 of the Portuguese proposition.

Special record is entered of this declaration of his Excellency Sir EDWARD FRY.

His Excellency Mr. **Hammarskjöld** states that in order to acquit himself of the task with which he, and others of his colleagues had been charged, he examined a certain number of treaties of commerce. Mr. LOUIS RENAULT had kindly offered to make a draft of the result of their labor, but he has not yet had the time to complete it.

Mr. **Guido Fusinato** requests from the committee permission for the members of the subcommittee, charged with finding a solution for a difficulty by which obligatory arbitration is confronted in conventions entered into by several parties, to postpone bringing in their report to a subsequent meeting. (*Approval.*)

Mr. GUIDO FUSINATO wishes, however, to state even now that the objections raised arise from the fact that the contractual bond is established between several States and that the dispute concerning the interpretation of the Convention may arise only between two of the contracting States. The application of obligatory arbitration to the settlement of the dispute has nothing to do with the main point of the difficulty.

He recalls on this occasion that the Universal Postal Convention also contains the clause of obligatory arbitration, and that during the many years it has been in force, it has led to none of the complications which are feared.

[444] Article 23 of this Convention offers a solution for the problem that has been brought up. The arbitral decision settles the dispute only with regard to the past and between the parties in dispute.

[1] Annex 19.

His Excellency Mr. **Carlin** agrees with the remarks just made by Mr. FUSINATO upon the latter point.

He wishes next, along the line of thought previously touched upon by his Excellency Sir EDWARD FRY, to state that, to his mind, it would be preferable to refer only to conventions *to be concluded*. For he believes the Conference is not entitled offhand to introduce into universal conventions, arbitral clauses that might be contrary to those stipulated in these conventions. The international Convention concerning the transportation of merchandise by rail, provides, for instance, in its Article 57, No. 3, for optional arbitration. His Excellency Mr. CARLIN believes that the Conference as here gathered, would not be competent to substitute obligatory arbitration in its place.

His Excellency Mr. **Alberto d'Oliveira** agreeing to the remarks just made by Mr. FUSINATO, recalls what the Russian delegation stated in 1899. We must not indeed lose sight of the fact that world conventions record an agreement of converging interests with regard to the interests of all the States for the unification of certain international services. There is no room here for conflict of interests; if a difference of interpretation arises, all the States are equally interested in seeing that a just settlement is reached.

Addressing himself to his Excellency Sir EDWARD FRY, his Excellency Mr. ALBERTO D'OLIVEIRA declares that he will take the former's proposition under serious consideration and that he is ready to study it. He then expresses to his Excellency Sir EDWARD FRY the feeling of satisfaction he has had in hearing him declare that the British delegation was ready to accept, without discussion, No. 3 of the Portuguese proposition.

His Excellency Mr. ALBERTO D'OLIVEIRA leaves it to the jurists who are members of the committee, to make answer to the question raised by his Excellency Mr. CARLIN. As for himself, he will confine himself to stating that he does not understand why the signatory Powers of a convention might not, by unanimous consent introduce modifications into it.

Mr. **Louis Renault** also could not admit the point of view taken by his Excellency Mr. CARLIN. In his judgment, no principle of law is opposed to the modification of the scope of certain definite points by the signatory Powers of a universal convention. And even supposing that only a few of these Powers should come to an understanding with a view to making recourse to arbitration obligatory with regard to themselves, a measure foreseen as of an optional nature in the Convention, this understanding, this supplementary convention might not, it would seem, injure in any way the acquired rights of the other States.

It is quite evident, declares Mr. LOUIS RENAULT, that we cannot here consider the question of granting only to the majority of these Powers the right to impose their will upon the rest.

His Excellency Mr. **Carlin** insists upon his point of view. He could not admit that a posterior convention of a very general scope might, offhand, modify a special convention, not even if all the signatory Powers of the latter convention were also signatories of the former. For other parties would have joined those originally involved; taken *in globo*, the parties would not be the same; the scope would have changed, and it is not for the exclusive purpose of making changes in certain provisions of a special convention that the parties would have grouped themselves anew. Now, this *animus* for modifying, and

for modifying *especially between the very parties originally involved,* is juridically essential.

[445] The **President** believes that this is more a matter of form than of principle. For either the clause of obligatory arbitration is entered into a convention, in which case the question is very clear, or the Convention contains only the stipulation regarding optional arbitration; two hypotheses are then possible: If the Peace Conference unanimously decides that recourse to arbitration must be made obligatory, it seems there is nothing that can prevent the signatory Powers represented in the Conference from accepting it. So that in this hypothesis only a question of form is to be settled, that is to say, the proper inclusion in the Convention of the decision taken by the parties. If, on the contrary, the Conference not being of a unanimous mind, only a certain number agree upon a new principle, they will act in full freedom, but they will enter upon a special, supplementary convention.

It seems, therefore, that we must come to an agreement as to the main question and that the objection of his Excellency Mr. CARLIN is rather directed to the form of the new convention to be adopted.

His Excellency Mr. **Asser** does not wish to participate in the discussion of the matter brought up by his Excellency Mr. CARLIN which appears to anticipate the report which the subcommittee will bring in at the next meeting.

He merely wishes to bring out that the two examples chosen for universal conventions are not very happy. In the first place, the Universal Postal Convention provides *expressis verbis* for obligatory arbitration. And with regard to the convention for railways, he believes that he must observe that in it, the solution of disputes between exploiting States has been most minutely regulated. Optional arbitration is recommended for differences of a trifling nature, and in order to settle them, special arbitral courts have been organized, composed, no doubt, of very capable technicians, but who can offer but little guarantee for the proper solution of strictly juridical disputes.

His Excellency Mr. ASSER believes that the introduction of obligatory arbitration in these conventions would not in any way mark a forward step.

His Excellency Mr. **Alberto d'Oliveira** believes that those different points in the Portuguese list which must still be examined, will not give rise to serious objections.

He merely wishes to tell the committee that, concerning the conventions for the railways, he proposes to adopt the proceeding which has been followed with regard to the treaties of commerce. This manner of proceeding conforms very closely to the spirit of the Portuguese proposition which seeks to submit to arbitration matters of a purely legal nature.

His Excellency Baron **Marschall von Bieberstein**: Among the points specified in the list of the Portuguese proposition there is found a series of conventions containing stipulations the interpretation and application of which belong to the national courts. I desire to call the attention of the committee to the matter of finding out what are the relations which should exist between the arbitral decision and the sentences of the national court.

The decisions of national jurisdictions, indeed, frequently give rise to claims. For instance: The State A is of opinion that to the detriment of those coming within its jurisdiction, the courts of the State B erroneously interpret and apply the provisions of a convention concerning industrial property. The State A complains to the State B; the latter expresses its regrets for the unhappy condition

of things, but declares that it cannot act upon the objections of the State A, because it is unable to intervene with its courts. Recourse is had to [446] arbitration and the decision is favorable to the State A. The State B will be obliged to give legal force to this decision, in order to have it accepted by its courts.

Right here we meet again with the difficulty set forth in the last meeting. Will the parliament of the State B admit the arbitral decision willingly and without complaint? Eminent jurists have answered that the refusal of the parliament would present a case of *force majeure*. Gentlemen, I fear that this rule may create great disturbances in international relations. Parliaments are composed of many jurists who will not fail, if necessary, to examine the minutes of these meetings, and when therein they shall find this judgment of their Hague confrères, I believe that the Governments will find the parliaments greatly encouraged for constituting the foreseen case of *force majeure*.

I repeat, gentlemen, that if we desire to include the principle of obligatory arbitration in a world convention, we must provide the means for carrying out arbitral decisions. I have already indicated two solutions for the problem:

1. It might be stipulated that obligatory arbitration is excluded in those cases when it would be necessary to act upon the decision to be taken by the national jurisdictions; but this would establish a new reservation to the principle of obligatory arbitration, whilst we are desirous of excluding reservations of a general nature.

2. It might be inserted in the Convention that every arbitral decision shall have legal force in the countries of the signatory States. This would make it necessary to submit this provision for the previous approval of the parliaments, and, gentlemen, I doubt very much if it would be readily obtained. For, as a rule, parliaments fear interference in the field of legislation.

I appeal to the jurists here present; the matter is important; it may arise frequently; and I believe it must be settled.

His Excellency Mr. **Martens** states that, to his knowledge, parliaments have never had either to approve or to sanction the many arbitral decisions rendered hitherto by the chiefs of State, by the arbitral courts or by the jurists. These decisions have been carried out, not by virtue of the approval of a national authority, but by virtue of the *compromis* itself.

It is difficult to submit a decision to the approval of a parliament, and his Excellency Mr. MARTENS believes that no State may obligate itself to do so; but he thinks that it is possible to create a *modus vivendi* which would not require approval.

Mr. **Heinrich Lammasch** wishes to reply to the remarks made by Baron MARSCHALL.

Like Baron MARSCHALL he believes that arbitral courts will generally have to settle a question of interpretation only in case the national courts have acted in a definite case. It is when the latter shall have rendered a decision and a State should find it necessary to complain about it that the matter of interpretation will be brought up and arbitration called for.

In his judgment, the arbitral decision gives only for the future an authentic interpretation of conventional provisions. The judgment of the arbitral court has no retroactive effect, and the decision of the courts in the case will remain final.

Baron MARSCHALL said that this interpretation would have to be submitted to the parliament in order to obtain legal force. Mr. LAMMASCH believes, on the contrary, that the decision will have legal force through the fact alone that the parties have signed a treaty, by which they submit the interpretation of clauses of certain conventions to arbitration. Through this fact, they have recognized the interpretation which the arbitral decision will give to it.

[447] Then recalling the difficulty previously met with, relative to those cases when the decision should order the modification of a legal provision, Mr. LAMMASCH restates what he had already stated in the last meeting and hopes that all the States will submit to the decision rendered by arbitrators, even as Austria-Hungary, in particularly painful conditions, in order to carry out the decisions of the Brussels Conference of 1905.

Mr. HEINRICH LAMMASCH closes his remarks by declaring that he does not share the fears of Baron MARSCHALL with regard to the opposition of the parliaments. He believes, on the contrary, that they are generally quite disposed to submit to arbitration and, however jealous they might be regarding their legislative prerogatives, they will not prove themselves unwilling in this respect.

Mr. **Guido Fusinato** agrees with the spirit of the remarks made by Mr. HEINRICH LAMMASCH; he believes that the question would be solved by the adoption of an article declaring that arbitral decisions shall have the same value as the Convention itself and must be equally observed. He does not share the fears of Baron MARSCHALL concerning the difficulty regarding the approval of such a general clause on the part of the parliaments.

His Excellency Sir **Edward Fry** believes that many cases will arise in which there will be conflict between arbitral decisions and those of national courts. The adoption of the Convention would, therefore, offer a choice between these two alternatives: to permit of an arbitral decision nullifying the decision of a national court, or to render the decision ineffective.

His Excellency Baron **Marschall von Bieberstein** admits that Mr. HEINRICH LAMMASCH has fully grasped his idea. He has, in effect, recognized the possibility of including in the Convention a general clause assuring to all arbitral decisions legal force within the territories of the signatory Powers. He doubts very much, however, if the parliaments may be inclined to accept a clause which would, in advance, oblige them to give legal force to all arbitral decisions.

As to the solution proposed by his Excellency Sir EDWARD FRY, Baron MARSCHALL has a radical remedy ready to hand; this would be to create a veritable international high court of appeals. It may be that the question will be ripe for decision at the next Conference.

His Excellency Mr. **Ruy Barbosa** would present some remarks along the line of thought to which the ambassador from Germany has given expression in this meeting. Although in favor of the Portuguese proposition, he believes that the ideas elaborated by his Excellency Baron MARSCHALL are irrefutable. He gives them his full approval in the terms which he desires to present.

In the first place, it should be noted that the opinion which would see in the resistance of a parliament to the fulfillment of a treaty duly concluded, a case of *force majeure* which would confer legal authority for invoking the maxim *"ad impossibilia nemo tenetur"* cannot be upheld. So soon as the international obligation exists, it affects both the legislative and the executive power of the State.

The State juridically bound by a regular convention, could not release itself therefrom through the pretext that the opposition of its parliament does not permit it to carry out the contract. Nevertheless, it is not admissible to fail to take into account in an international convention, the fundamental, constitutional laws of country. If a stipulation affects them it will create within the body of the nation whose conduct it is sought to regulate, a revolutionary situation of antagonism between the established Powers and the constitution from which the latter emanate. Such a state of affairs would be irreconcilable with the juridical organism and would tend to the confusion of public order.

[448] The States can, therefore, not submit to the treaties that might stipulate international obligations in contradiction with the fundamental principles of the national law. But it is this which would happen if one were to regard the international court as a reviewing instance for certain decisions rendered by national courts.

It is precisely to this that we would come in the hypotheses indicated by the first delegate from Germany, in case it were admitted, that, in such cases, the decisions of national jurisdictions would not be definitive. If we consider well the circumstances such as he has described, it will be found that such a result is inevitable. For let it be imagined that one were pleading before a national court one of those controversies of private interest which may arise with regard to some of the articles of obligatory arbitration enumerated in the Portuguese proposition. The final decision has been pronounced by the judges of the country; all the recourses are exhausted; the decision has the force of a matter adjudicated. But those who are dissatisfied with the judicial decision which has been rendered, address themselves to their Government which, in its turn, and supporting their claims, addresses itself to the State whose courts have just acted. What will follow if the State addressed consents? Recourse will be had to arbitration and the examination of the case will come up for review before the arbitral court. Let us, however, consider the juridical importance of such a state of affairs and examine the consequences thereof. Two hypotheses are possible. Either the arbitral court will confirm the judgment rendered by the national courts, or it will revise it. In the former case, the judgment would not have acquired the force of a matter adjudicated except as the international decision had sanctioned it. In the second case it would be annulled by the arbitral decision. Now, from the juridical point of view, that means that the national court is, with regard to the international court, put in the same situation as the courts of first instance with regard to the national courts in the judicial organism of any country whatever. There would no longer be any adjudicated matter in so far as certain classes of cases are concerned, before recourse through diplomatic channels, or recourse to the arbitral court had been exhausted.

Now, this new jurisdiction would even have privileges which the principles of ordinary procedure would not tolerate. According to a universally recognized law, appeal from a judicial decision can be had only within a definite period of time, after the lapse of which, if the parties have not availed themselves thereof, the decisions have the force of a matter adjudicated. In this case, on the contrary, there would never be any adjudicated matter. The claim might arise at any time, and, from the moment when it should arise, the instance for reviewing it would always be open. So that, with regard to the international court, the decisions of the national court would be in a position less favorable

than that of a court of first instance in respect of the courts of appeal. For this class of cases, the arbitral court would become a true court of appeal, and endowed with extraordinary privileges. Is this compatible with the principle which everywhere considers the national court as one of the organs of the sovereignty of the State, the expression by which the constitutions themselves designate the judicial power in all countries? Would it retain this character of power, organ of the national sovereignty, if its most sacred decisions were, in the last resort, subject to the discretion of a foreign court? Would constitutions which confer autonomy and independence upon the judicial power in respect of the executive power, permit the latter to deny all authority to final decisions, and to subject them to arbitration before an international jurisdiction? If, under the *régime* of other constitutions, such a singularity were admissible, a fact which Mr. RUY BARBOSA can not believe in so far as he is acquainted with them, he is able to state that this would be impossible in so far as the constitution of his own country is concerned. In the Brazilian constitution [449] there are precise texts which determine peremptorily that, in disputes with the Government of the country, or between foreign citizens and Brazilian citizens, as well as between foreign States and Brazilian subjects, the authority of the federal administration of justice is alone competent. And how could the Brazilian Government admit that in certain ones of these questions the superior and final intervention of an international court could be established?

The difficulty has not escaped the keen mind of Mr. LAMMASCH, for he has but just told us that in such cases, arbitral decisions would have no effect upon the matter adjudicated: they would have authority for the future only, by establishing rules that would be obligatory for the national courts in questions to be settled subsequently and only in exactly similar cases.

By admitting this doctrine, we avoid one difficulty, but we meet with another one which is not less serious. For it results in changing the nature and the scope of arbitration, by substituting for it a quite different idea, and at the same time it sows into the domestic public law of the nations another germ of confusion which the constitutional principles would absolutely reject.

It is not difficult to prove that this is so. Hitherto we have regarded arbitration merely as one way of settling pending questions. When a difference arose which the parties interested were unable to solve, they sought in an arbitral decision the means of reaching a friendly understanding. Furthermore, arbitral justice was regarded merely as the last remedy for solving a disputed question, but never for prejudging future questions. And so we see the unbridgeable gulf which separates our present notion of arbitration from that seemingly implied by the new effects resulting from an arbitral decision.

However, if this idea were to prevail, it would, in the internal public law of all countries constitute a formidable innovation which would compel all of them to reform their constitutional laws. What does it mean when we say that arbitral decisions will provide for the future? It means that they shall have legal force. A law is a rule of law, applicable, in the future, to a certain class of questions. Gentlemen, it lies within the very essence of the arbitral decision that it should limit itself to solving the case which is submitted. Furthermore, it lies within its essence that it be particular to that case. On the other hand, it lies within the essence of the law that it be common to a definite class of hypotheses and it should exercise its authority only for the future.

Hence, if we take the arbitral judgment as the general solution of an eventual series of future cases, specifically excluding the anterior case whose examination gave rise to it, we take away from it the character of decision, in order to impress upon it the character of law.

In that case, arbitral courts will no longer render decisions; they will promulgate real laws for the countries coming under their jurisdiction. And these decisions would not merely impose themselves upon the jurisprudence of the national courts for all matters of the same nature, but even upon the action of the legislative power, which could only bow before them, and surrender to the foreign authority the field where it might desire to establish itself.

Thenceforward, we should have this rivalry of a foreign Power with the national powers within the legislative field itself, a rivalry to which, in this meeting, Baron MARSCHALL alluded this day. Would the legislative chambers submit thereto? It is quite evident that they would not. Could they, even if they were inclined to do so? No, they could not. The matter becomes even clearer with regard to the countries, such as Brazil, whose constitutions exclude all parliamentary intervention in the sphere of the other powers, by not granting to the legislative chambers the authority to modify the constitutional laws.

[450] Under this régime of limited and insurmountable powers, if the legislative power attempted to give imperative force, either against the judgments of the courts in matters affecting a case that has been decided, or against their jurisprudence, by confining it, for future cases constitutionally within their jurisdiction, to a rule of general obligation, these courts to which has been given the power and upon which has been imposed the duty of refusing obedience to all unconstitutional laws would openly disobey the act of the legislature, in the most legitimate exercise of their functions. The advent of this doctrine would, therefore, not be possible in these countries, without a reform which would affect the very principles of their constitutional institutions.

His Excellency Mr. RUY BARBOSA is not unaware of the fact that in some constitutions of this type the character of national laws has been expressly given to international treaties. But even as the national laws are strictly subject to the constitution which they could not violate without becoming non-existent, even so the international conventions, in order that they may be ratified by the chambers, must be in agreement with the constitutional rules. It is only upon this condition that they might be admitted among the national laws.

From all the preceding it follows that in the admission of any principle of obligatory arbitration, it must always be understood that the constitutional authority of the national court is safeguarded.

His Excellency Mr. **Milovan Milovanovitch** does not believe that the question is really so complex as one might think at first sight. If the decision rendered by the courts of any State whatever leads to an obligatory arbitration, the *compromis* concluded by the States already contains the guarantee for the execution of the arbitral decision. If the State which is condemned by the arbitral court admits that its courts were wrong, it will resort to legislative measures in order to prevent them from again falling into the same errors of interpretation; if, on the contrary, the State is dissatisfied with the arbitral decision, it may avail itself of the next case of a like nature to secure a new arbitration. And as a last resort, in case the State could not bring itself into harmony with the arbitral decision, there is still left the possibility of its de-

nouncing the Convention which it finds has been unjustly interpreted to its disadvantage. Mr. MILOVANOVITCH believes, moreover, that public opinion is judge in the last analysis and that there is nothing to authorize us in believing that it will always be opposed to the measures to be taken, even if the matter should concern the modification of the municipal legislation in the sense indicated by the arbitral decision.

His Excellency Mr. **Hammarskjöld** calls attention to the fact that the difficulties inherent in the questions which the committee is discussing have led him to confine his arbitration proposition to pecuniary matters.

The first delegate from Sweden believes that it is necessary to distinguish between the international obligations of the States and the conventions regarded as an integral part of a national legislation. In the latter case the courts are sovereign. Thus, in the supposition of claims on the part of the State B against the interpretation given to a convention by the courts of the State A, it may happen that A acknowledges the justice of the claims of B and modifies its legislation with a view to enacting a new jurisprudence. In the contrary case there will be arbitration, and if B is favored by the decision, B is likewise obliged to secure a modification of its laws. It is true that it may avoid this, but this is an eventuality which may arise in any hypothetical case and which is in no way imputable to obligatory arbitration. The constraint exerted over A to modify its legislation is always a moral constraint.

Mr. **Louis Renault** thinks that the matter is of extreme gravity with regard to friendly international relations. If the objections that have been pre-
[451] sented were really irrefutable, one should despair of ever being able to establish an international justice. It may happen that in any country a certain jurisprudence may take shape which the Government believes contrary to the spirit of the law. What will the Government do? It will have an interpretative law adopted which will be obligatory for its courts. Mr. LOUIS RENAULT thinks that within the international field there must always be found analogous means to ward off an abusive interpretation of the treaties.

It has been said here that a State which might be dissatisfied with the interpretation of a convention on the part of the courts of another State, would but have to denounce the Convention itself. This radical solution is especially iniquitous when we are considering world treaties, for a State is then put to the alternative of either accepting an abusive interpretation or of separating itself from the Convention. To be efficacious, an international convention must insure uniformity in its application.

Mr. LOUIS RENAULT does not think that a Government may allege refusal on the part of its parliament as a case of *force majeure*. If a State is condemned, it bears then an international obligation which must be observed by the totality of its powers. In illustration of this, he cites the example of a *compromis* by which the arbitrators were charged with fixing the amount of an indemnity. Would a parliament, in such a case, have the right to refuse the adoption of a law necessary for the execution of the arbitral decision?

Mr. LOUIS RENAULT then takes up the question of determining whether the aid of parliament is always required to give legal force to an arbitral decision. He sets forth that the convention for obligatory arbitration having been submitted to parliament, the latter accepted it in the exercise of its sovereignty. And it is by virtue of this same sovereignty that it must likewise accept the inter-

pretation which the arbitral court shall give to this convention, inasmuch as the court was formed only in virtue of an act of national sovereignty. The execution of this decision is but a corollary of this act of sovereignty. In no way does the parliament surrender its rights; but it accepts the interpretation of the arbitral court as preferable to conflicts between the different national courts.

Mr. Louis Renault repeats that it is extremely serious to admit the proposition to refuse to receive complaint against the decisions of the national courts, precisely in that field where uniformity, above all, is desirable, that is to say, in the field of private international law, of literary conventions, etc. If this uniformity were only apparent, the machinery of international relations would not be facilitated.

Mr. Louis Renault concludes by stating that the same considerations apply to independent arbitration conventions. Germany herself has put *compromis* clauses into her treaties of commerce. Would not an arbitral decision rendered in execution of such a clause have legal force by itself? The difficulties whereof we have spoken in this matter are not inextricable, but if we admit the proposition to refuse to receive complaints which have been under discussion, we shall create a serious danger against the goal of unification which arbitration has in view.

His Excellency Mr. **Asser** does not fully agree with Mr. Louis Renault. In his judgment, a distinction must be made. An international convention may contain two different clauses. For the case when the convention includes an obligation, his Excellency Mr. Asser shares the view taken by Mr. Louis Renault: such are conventions obligating the Governments to meet the wishes of rogatory commissions. But, on the other hand, a convention may contain provisions to which the contracting States obligate themselves to give legal force in their country, as for instance, conventions concerning private international law. His Excellency Mr. Asser believes that the national judge must preserve his entire independence with regard to these conventional provisions, even as he does with regard to any other domestic law. It is true that Mr. Louis Renault asks what becomes in such a case of the uniformity of the application of
[452] the convention; to this, his Excellency Mr. Asser makes answer by stating that the same situation is met in the interpretation of the municipal laws, and this despite the existence of the courts of appeal.

His Excellency Mr. Asser closes by proposing that the following words be added after point *n* of Article 16 *b* of the Portuguese proposition:[1] *"in so far as they contain obligations contracted by the States."*

He would, however, prefer to have the idea expressed in a general way in a clause to be added at the end of the article or recorded in an additional protocol.

His Excellency Baron **Marschall von Bieberstein** states that he approves of the general principles of the first part of the remarks of Mr. Louis Renault, but he reserves his judgment with regard to other points. For instance, he doubts that even in a case of a particular treaty, the courts of the different States will give direct legal force to an arbitral decision. Nor is he sure, on the other hand, if this would be true regarding the courts of the German Empire. Baron Marschall does not believe that the difficulties met with even in regard to particular treaties, will release the committee of examination from the duty of finding a solution for universal treaties.

[1] Annex 19.

Mr. **Louis Renault** declares that the words of his Excellency Mr. ASSER are extremely grave and might tend to compromise the future of the conventions concerning private international law. Mr. LOUIS RENAULT formally contests that a State, from the international point of view, is not responsible for the decisions of its courts. They could not be made inviolate.

Mr. **Guido Fusinato** cites the example of an arbitration between Italy and Peru concerning the interpretation of a convention for the reciprocal execution of legal decisions between the two States, as rendered by the courts of Lima. The Swiss arbitrator having awarded in favor of Italy, the Peruvian Government declared that the decision of the court of Lima was intangible, but it paid an indemnity.

His Excellency Mr. **Alberto d'Oliveira** states that he will accept the proposition of his Excellency Mr. ASSER, for conciliatory reasons, but without stating, for the time being, his opinion regarding the different juridical theses which have just been developed with such eloquence. He merely desires to add that, in his judgment, most of the criticisms now directed against obligatory arbitration are applicable to the whole field of international law. His Excellency Baron MARSCHALL VON BIEBERSTEIN has put us on our guard against the danger to be incurred by working out here a *lex imperfecta*. But, being without sanction, is not every international law imperfect? And in answer to the remarks of his Excellency the first delegate from Germany, is it not now opportune to recall the words of the eminent BLUNTSCHLI who in one of his works says:

> Since there is no universal legislator, the world must content itself now with the *imperfect* manner in which international law is at present formulated, and the different States must recognize this law as generally and as uniformly as possible.

And he adds:

> The obligation to respect treaties is a matter of the conscience and rests upon the sentiment of justice.[1]

His Excellency Baron **Marschall von Bieberstein** states that he accepts the theory of Mr. LOUIS RENAULT to the effect that the State is responsible for the action of its courts, but this is an argument which proves too much. The more so because it is necessary to provide it with the means for carrying out its obligations.

His Excellency Mr. **Martens** entirely shares the view of Mr. LOUIS RENAULT.

The work of the conventions of private international law which owes so
[453] much to the efforts of his Excellency Mr. ASSER, will assume its full worth if the international court is not in position to give them an authentic interpretation.

His Excellency Mr. **Luis M. Drago:** I feel compelled to oppose the idea of submitting controversies relating to treaties dealing with private international law to obligatory arbitration. As we well know, private international law bears upon matters connected with the attributes of the sovereignty of the States, with the power which they possess of enacting their own laws with regard to persons and things. They are generally questions concerning the acquisition and loss of property, marriage, domicile, in short the personal and real statutes which are

[1] Cited by MÉRIGNHAC in one of his works.

at stake, and, along with them, that which more than ever might be called the vital and political interests of a State.

After the remarks of their Excellencies Messrs. ASSER and D'OLIVEIRA, his Excellency Mr. **Ruy Barbosa** declares he is in favor of the formula submitted by his Excellency Mr. ASSER. It seems to him that it offers a satisfactory solution. We must agree to it or to its equivalent by rejecting the idea that the Governments might answer for the decisions of their courts in questions coming within the judicial competence. He does not desire to examine all the constitutions, but as regards the constitution of his own country at least, such a juridical notion would be absurd. Under the principles of that constitution, the federal administration of justice is the supreme authority for the interpretation of the constitution. In the last instance, it decides regarding the constitutionality of the acts of the legislative power, even as it does with regard to those of the executive power. How then could the latter or the former answer for the acts of the power established by the constitution itself, in order to safeguard the inviolability of the constitutional provisions?

It might be said that the other States would not submit to it. In that case, they would, however, bring the matter within the sphere of force. The weak would feel the consequences of it; but constitutional law would nevertheless have prevailed.

His Excellency Mr. **Carlin** states that the Swiss delegation could not accept obligatory arbitration with regard to matters where extradition is involved; in case of conflict in this matter, it is incumbent upon the Supreme Court of the Confederation to act as the last instance.

Special record is entered of the declaration of his Excellency Mr. CARLIN.

The **President**: Gentlemen, our discussion has exhausted the Portuguese list.

Certain parts of its enumeration have given rise to objections, and we have even charged two subcommittees to find solutions for two particularly difficult questions, one of them relating to treaties of commerce and navigation, and the other concerning the influence of arbitral decisions in conventions. Others, on the contrary, have not led to any discussion.

With the greatest intellectual pleasure I have listened, gentlemen, to the exchange of views which has taken place to-day. At certain moments it seemed to me that I was not in a simple committee of examination, but rather in an academy of international law where the most distinguished jurists and the most experienced diplomats have engaged in a juridical joust.

Among the objections offered, I have noticed many that are applicable to the entire field of international problems.

They are applicable both to optional arbitration and to obligatory arbitration. This lays open before us a whole field of problems of a theoretical nature.

Gentlemen, it devolves upon international jurisprudence, clearly to set forth the consequences of treaties that are to be concluded.

[454] The discussion has borne upon the possible results of arbitral awards and upon the theoretical conflicts which might follow, rather than upon the difficulty which recourse to arbitration in itself and the conclusion of treaties making it obligatory might present.

As regards the decisions, it would seem that Mr. HEINRICH LAMMASCH has indicated a just solution, by stating that in this question national jurisdictions

decide sovereignly. As regards conventions, it should be said that they will have the same sanction as in general conventions. If some Powers should find it impossible to carry out their obligations, they may denounce the Convention: this is a necessary evil as long as the progress of ideas will not have forced parliaments to yield. Gentlemen, I would once more revert to the first question so clearly defined by Mr. MARTENS:

> Is there a certain number of cases of obligatory arbitration which it is of the highest importance to set down?

In doing so, are we going to render service to the general cause of arbitration? If so, let us together take some steps within this solid ground whither public opinion invites us. It is the ground of agreement and of universal international understanding.

The meeting closes at 12: 30 o'clock.

[455]

TENTH MEETING

AUGUST 19, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the eighth meeting are adopted.

The **President** grants the floor to Mr. GUIDO FUSINATO to make a report upon the conclusions of the subcommittee (composed of his Excellency Mr. MÉREY VON KAPOS-MÉRE, his Excellency Mr. ASSER and Mr. GUIDO FUSINATO) who had been charged with the study of the questions concerning:

1. The exclusion of conventions the application of which comes within the jurisdiction of the national courts;

2. The effects of an arbitral decision concerning the application or the interpretation of a convention concluded between several States, upon the other signatory States of the convention interpreted by this decision.

Mr. **Guido Fusinato** states that as regards the first question, two points of view must be considered. One, advocated right here by the authority of his Excellency Mr. ASSER, is that of limiting obligatory arbitration to the conventional provisions by which one Government obligates itself to undertake direct prestations toward another State or to its *ressortissants*, and from which, in consequence, arise obligations which must be directly carried out by the Governments themselves. Those conventions which, on the contrary, establish rules to be applied by the courts to private individuals within the territory of each contracting State, do not come within the field of obligatory arbitration. As regards these provisions, the State will have fulfilled its duty in giving them legal force. Their application and their interpretation are reserved to the exclusive competence of the judicial authority.

The other point of view which has been developed especially by Mr. LOUIS RENAULT, does not admit this distinction, nor the consequences adduced therefrom as regards the limitation of obligatory arbitration. In its international relations, the personality of the State is indivisible. The State is always responsible for the action of all its powers as regards a convention which it has signed.

The subcommittee has taken no action as regards the question of principle; and Mr. GUIDO FUSINATO expressly reserves his personal opinion; but he [456] could not but realize that the application of obligatory arbitration to the conventional provisions of the second class meets with insurmountable opposition. It is for this reason and for purposes of conciliation, that he proposes to limit obligatory arbitration, in the cases referred to in No. 1 of Article 16 *b* of the Portuguese proposition, to the conventions of the first class, that is to say, to

conventions concerning direct engagements of the Governments themselves, and to inscribe the following declaration into the minutes:

> The restrictive formula, added to No. 1 of Article 16 *b* of the Portuguese proposition, has been inserted for conciliatory ends, following exchanges of views that have taken place in the committee of examination, and with the intention of excluding from obligatory arbitration the conventions in question, in so far as they refer to provisions the interpretation and application of which, in case of dispute, come within the competence of the national courts.

As to the second question, the subcommittee, in the first place, considered the case when all the signatory States of a convention intervene in a dispute.

The arbitral decision will, of course, be valid for all, and in case of the interpretation of a conventional provision, the decision will have the same value as the Convention itself.

If, on the contrary, the difference arises between only a few of the contracting States, the decision can create no obligation for the other States.

It has been established, as a general principle, that the arbitral decision binds only the parties to the dispute and for this dispute only. The situation is the same as that existing in the national jurisprudence: the interpretation of a law given by a court binds only the parties to the suit and only for that suit.

But if all the other States declare their willingness to accept the interpretation given by the court, it becomes a law for all.

In consequence, the first subcommittee of the committee of examination proposes to modify Article 16 *b* of the Portuguese proposition [1] as follows:

I

The high contracting parties agree not to avail themselves of the preceding article in the following cases:

1. Disputes concerning the interpretation or application of conventions concluded or to be concluded and enumerated below, so far as they refer to agreements which should be directly executed by the Governments or by their administrative departments.

(a) .....

(b) .....

.....

.....

II

If all the signatory States of one of the Conventions enumerated herein are parties to a litigation concerning the interpretation of the Convention, the arbitral award shall have the same force as the Convention itself and shall be equally well observed.

If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time, and they have the right to intervene in the suit.

The arbitral award, as soon as it is pronounced, shall be communicated by the litigant parties to the signatory States which have not taken part in the suit. If the latter
[457] unanimously declare that they will accept the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the judgment shall be

[1] Annex 19.

valid only as regards the matter which formed the subject of the case between the litigant parties.

It is well understood that the present Convention does not in any way affect the arbitration clauses already contained in existing treaties.[1]

Mr. GUIDO FUSINATO closes his remarks by declaring that he, personally, goes beyond the conclusions of the subcommittee. As regards the first question, he accepts the judgment of Mr. LOUIS RENAULT; as regards the second question, he would have desired to make the universal obligatory force of an arbitral decision dependent upon a majority of three-fourths of the contracting States.

The **President** expresses his thanks to Mr. FUSINATO for his very interesting work, and also to the subcommittee.

His Excellency Baron **Marschall von Bieberstein** finds that the conclusions of the subcommittee are logical, but that they tend to nothing less than to reduce to almost naught, the number of cases susceptible of obligatory arbitration. Apart from the conventions concerning private international law, there are many that would be applicable by the courts and, in consequence, would escape obligatory arbitration.

Among others, Baron MARSCHALL calls attention to the Berne Convention of 1886 concerning literary property, and to that of Paris of 1883 concerning industrial property, as being among treaties to be eliminated, if necessary. If this procedure is to be followed there will be left but few matters susceptible of obligatory arbitration.

His Excellency Mr. **Milovan Milovanovitch** states that the formula of the subcommittee is defective from the point of view of doctrine, because there is no reason whatever to distinguish between State obligations carried out by the administrative agencies and those coming within the competence of the courts.

From the practical point of view, obligatory arbitration would lose all its value in consequence of this formula.

He declares, moreover, that it would be even difficult to fix in a uniform manner, and in all countries, the competence of the judicial and administrative authorities with regard to certain matters, a competence which forms the very basis of the formula. For, where the courts are competent in one country, the administrative authorities are competent in the other and also in the same country, and that which to-day is within the administrative competence, may to-morrow come within the judicial competence. He believes that in general the acceptance of the formula of the subcommittee will bring only discredit upon arbitration.

His Excellency Mr. **Luis M. Drago** declares that the distinction proposed by the subcommittee entirely changes the aspect of the Portuguese proposition. If it is stipulated that conventions subject to judicial interpretation are taken out of the field of obligatory arbitration, only administrative questions which must frequently border on politics will be submitted. Such, for instance, would be matters relating to the freedom of navigation upon rivers.

The **President** remarks that it is precisely the duty of the committee of examination to measure the scope of the proposition of the subcommittee.

Mr. **Guido Fusinato** emphasizes the fact that the formula under discussion was drafted in a conciliatory spirit, following the formal declarations made by

[1] Annex 30.

several delegations that stated their inability to accept the principle of obligatory arbitration for conventions, the application of which comes within the [458] jurisdiction of the courts. He believes, moreover, in answer to the remarks of Mr. DRAGO, that there are numerous, purely *legal* obligations that establish direct engagements of the Governments. The formula is merely intended to exclude matters concerning, specially, the relations between private individuals that are to be settled by the courts.

His Excellency Mr. **Asser** remarks that the objections raised against the formula of the subcommittee do not seem serious.

If you will read over what I stated on July 16, you will find that, in fact, the list of cases that may be adopted is not in itself of great importance, and that the essential value lies in the moral effect which might result from the adoption of obligatory arbitration without reservations. It is for the principle that we must fight, and it is the triumph of the principle that we must applaud. By limiting ourselves to the conclusions of the subcommittee, we would secure but a restricted list: but this was foreseen from the beginning, and in spite of that fact, the list would remain an interesting one: it would certainly mark a beginning.

His Excellency Baron **Marschall von Bieberstein** agrees with Mr. FUSINATO in that the formula of the subcommittee reserves administrative questions to obligatory arbitration. But Mr. MILOVANOVITCH is right when he brings out the difficulty there is in distinguishing between the judicial and administrative competences. Thus, extradition is, in one country, of the competence of the judicial power and in another country of the administrative power.

His Excellency Mr. **Hammarskjöld** criticizes the text of the subcommittee and states that it is necessary to distinguish between direct obligations between States and relations between individuals that may result from international treaties.

According to his Excellency Mr. HAMMARSKJÖLD, a State which assumes contractual obligations is responsible in the totality of its powers and must insure the execution of the treaty through the medium of all its agencies.

His Excellency Mr. HAMMARSKJÖLD proposes, therefore, to substitute for the words: "*agreements . . . administrative*" in the text of the project of the subcommittee, the words: "*reciprocal obligations of the two States.*"

His Excellency Mr. **Alberto d'Oliveira** expresses his approval of the remarks of his Excellency Mr. HAMMARSKJÖLD.

His Excellency Mr. **Martens** calls for the printing and the distribution of the report of the subcommittee.

His Excellency Mr. **Milovan Milovanovitch** admits that the proposition of the subcommittee has been perceptibly corrected, especially from the theoretical point of view, by the amendment of his Excellency Mr. HAMMARSKJÖLD. It remains none the less true that obligatory arbitration would lose much of its value if it were not to bear upon any of the matters to be decided by the courts.

His Excellency Mr. **Luis M. Drago** advises the explicit statement that administrative questions are not susceptible of obligatory arbitration except in so far as they are not of a political character.

The **President** puts the second part of the report of the subcommittee to discussion.

His Excellency Baron **Marschall von Bieberstein** states, regarding the proposition of the subcommittee, that he does not understand how a decision

pronounced as between the States A and B and to which the other signatory States of the Convention had not given their adhesion would have value only for the special case, when in fact the State which has put in its claim and which would have obtained decision in its favor, has called for a general interpretation, valid for the future.

[459] Mr. **Guido Fusinato** answers by saying that men do not go before a court to secure a declaration of principle, but to settle a dispute.

His Excellency Baron **Marschall von Bieberstein** does not deny that all disputes refer to definite cases. This does not prevent the State A from lodging complaint with State B on the ground of a series of decisions which to it seem to injure the interests of its nationals. He does not, in this case, call for the annulment of decisions already rendered, but contemplates making an end of the error to which he refers and to bring about a general improvement, a new jurisprudence for the future.

Baron MARSCHALL thinks that it is necessary to provide against the danger to which one is exposed in this system in having a series of different interpretations of the same treaty.

His Excellency Mr. **Ruy Barbosa** states that it is not possible to foresee everything; the same danger exists within the States, where oftentimes the courts give different interpretations to the same law.

His Excellency Mr. **Alberto d'Oliveira** entirely shares the view of his Excellency Mr. RUY BARBOSA; he thinks even that the danger is greater within than without, for the domestic decision may not attract any attention; as a rule, an arbitral decision will have greater notoriety and repercussion throughout the world than a decision of a national court has within the territory of the country.

Arbitrators may not disregard the established jurisprudence; they will deflect from it only in case they should find it defective.

Mr. **Heinrich Lammasch** approves of the view expressed by his Excellency Mr. ALBERTO D'OLIVEIRA, and in particular for the following reasons:

Cases submitted to arbitration are seldom identical; the general features only recur. If the arbitral decisions are not absolutely identic, the reason for it will be found in the disparity of the special cases. For this reason, the real contradictions feared by Baron MARSCHALL will present themselves, therefore, only in very rare cases. On the other hand, the arbitral decision will always exercise a great moral influence upon future arbitrators. The unification of jurisprudence will gradually come about of itself.

His Excellency Baron **Marschall von Bieberstein** finds it absolutely impossible to establish a comparison between national jurisdiction and international arbitral jurisdiction. National legislation is uniform whilst international jurisdiction is controlled by a large number of different legislations. In the second place, national jurisprudence has a remedy in the court of appeals which renders judgment, all the chambers being united upon the questions of principles.

His Excellency Mr. **Milovan Milovanovitch** shows that in practice disputes generally bear also upon the interpretation of a treaty, although they result from an application in a definite case and from an interest prejudiced on the occasion of this application. Hence, how can it be said that the arbitral decision applies only to special cases? The arbitral decision must, in future, bind the States between which it has intervened for the interpretation of a clause. The Universal Postal Convention regulates arbitration in this sense by introducing, so far as the States

not involved in the dispute are concerned, a difference for cases of greater or lesser importance. We might profit by this idea; or leave to the conventions, as they are being renewed, the regulation of obligatory arbitration.

[460] After a further exchange of views upon the matters that have just been discussed, the **President** grants the floor to his Excellency Mr. HAMMARSKJÖLD to report the conclusions of the second subcommittee of the committee of examination.

His Excellency Mr. **Hammarskjöld** declares that the subcommittee has no proposition to present; that it merely reports the result of an inquiry which it undertook with a view to designating a few cases usually provided for in treaties of commerce and susceptible of obligatory arbitration.

He then reads aloud the following memorandum:[1]

> Obligatory arbitration, rejected for "treaties of commerce and navigation," the scope of which is too broad and too complex, might be proposed *for the interpretation:*
>
> of treaty provisions concerning customs tariffs;
>
> of clauses granting foreigners the right to pursue commercial navigation personally under certain restrictions;
>
> of clauses regarding taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck;
>
> of clauses concerning the measurement of vessels;
>
> of clauses providing for equality of foreigners and nationals as to taxes and imposts;
>
> of clauses relative to the right of foreigners to pursue commerce or industry, to practice the liberal professions, whether it is a case of a direct grant, or being placed upon an equality with nationals;
>
> of clauses providing the right of foreigners to acquire and hold property.

His Excellency Baron **Marschall von Bieberstein** calls the attention of the committee of examination to another matter. There is a series of treaties obligating the contracting parties to enact legislation in this or that sense, as for instance, the conventions relative to the protection of workmen. What would be the consequence of the inexecution of such an obligation? Would it constitute a case for obligatory arbitration?

His Excellency Mr. **Luis M. Drago** declares that he regrets not being able to accept, in the name of his country, that laws edicted in defense against epizooty or other diseases of animals or of plants, may be submitted to obligatory arbitration, even in case they had been the object of a convention.

It is inconceivable that, in view of an arbitral decision, a country should be compelled to admit within its territory the vines attacked by the phylloxera or that, under the same conditions, it should be compelled to receive cattle afflicted with aphthous fever. And this might likely happen if the clauses of a convention must be interpreted in agreement with the data or the new circumstances not taken into account at the time of the signing of the Convention, or for want of information, as frequently happens, in order to decide questions of fact upon which the disputes would bear in most cases.

Each State must preserve its full and complete right to take such measures of a sanitary nature as it might believe indispensable for its agricultural or indus-

[1] Annex 33.

trial development, and this on the basis of the necessities of the moment. In many cases and for more than one country, this is a really essential matter.

[461] His Excellency Mr. **Asser** states that number *n* of the Portuguese proposition (Convention relative to matters of private international law) includes number *o* (Convention concerning civil procedure).[1]

His Excellency Sir **Edward Fry** reads aloud the following declaration by which, in the name of the British Government, he proposes a new text[2] for Articles 16 *a*, 16 *b* and 16 *c*, and an enumeration of cases of obligatory arbitration.

ARTICLE 16 *a*

The high contracting parties agree not to avail themselves of the preceding article in the following cases:

1. Disputes concerning the interpretation of treaty provisions relating to:
   - (*a*) Customs tariffs.
   - (*b*) Measurement of vessels.
   - (*c*) Equality of foreigners and nationals as to taxes and imposts.
   - (*d*) Right of foreigners to acquire and hold property.

2. Disputes concerning the interpretation or application of the conventions listed below:
   - (*a*) Conventions regarding the international protection of workmen.
   - (*b*) Conventions concerning railroads.
   - (*c*) Conventions and rules concerning means of preventing collisions at sea.
   - (*d*) Conventions concerning the protection of literary and artistic works.
   - (*e*) Conventions concerning the regulation of commercial and industrial companies.
   - (*f*) Conventions concerning monetary and metric systems (weights and measures).
   - (*g*) Conventions concerning reciprocal free aid to the indigent sick.
   - (*h*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
   - (*i*) Conventions relating to matters of private international law.
   - (*j*) Conventions concerning civil or criminal procedure.

3. Disputes concerning pecuniary claims for damages, when the principle of indemnity is recognized by the parties.

ARTICLE 16 *b*

It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 16 *c*

The provisions of Article 16 *a* cannot in any case be relied upon when it is a question of the interpretation or application of extraterritorial rights.

The **President** has a special record made of the declaration of his Excellency Sir EDWARD FRY. The proposition will be printed and distributed.

[462] His Excellency Baron **Marschall von Bieberstein** calls attention to the fact that it must be understood that the acceptance of Article 16 *b* will be subordinated to the previous acceptance of Articles 16 and 16 *a*.

He then observes, as a further proof of the impossibility of listing really incontrovertible cases of obligatory arbitration, the example of the conventions

[1] Annex 19.
[2] Annex 31.

concerning the railways; certain of these conventions, in some countries, under certain circumstances may have an absolutely political and military character and importance, and thus escape obligatory arbitration.

His Excellency Mr. **Alberto d'Oliveira** answers by stating that it will be necessary to proceed as in the case of treaties of commerce, that is to say, examine if in the conventions relating to railways, there are involved purely legal questions that may be submitted to arbitration.

His Excellency Mr. **Milovan Milovanovitch** believes that it will not be easy to discover the purely legal nature of a difference concerning the interpretation of the conventions relating to railways, extradition, diplomatic and consular privileges, capitulations.

Passing to point two of Article 16 *b* relative to the fixation of boundaries, his Excellency Mr. **Alberto d'Oliveira** declares that this deals merely with technical matters, for instance the divergences relative to the application to the field of a boundary treaty.

His Excellency Mr. **Carlin** shares the view just expressed and finds that the expression "delimitation of boundaries" would be more exact; but it would be necessary to add that in the sense of this provision, the rectification of the boundary would not include the cession of inhabited territories.

His Excellency Mr. **Martens** states that the discussion which took place just now proves that it is very difficult to come to an agreement upon general terms. He again calls attention to his proposition of, in the first place, reaching an agreement with regard to some special cases of obligatory arbitration.

He does not believe that unanimity will be secured for the totality of the cases under discussion, but he will be happy if a beginning is made.

His Excellency Baron **Marschall von Bieberstein** approves of the view of his Excellency Mr. MARTENS as regards the difficulties of which he spoke. Each point has given rise to the expression of diverging views. It is impossible, however, to examine all treaties in detail. He might signalize a new case, that of the capitulations, which are frequently of great political importance.

It will, therefore, be necessary to make everywhere and in each case new reservations. What does that prove? It proves that the question is decidedly not ready for discussion, and that it would be imprudent to desire a solution before the proper time has come. The discussion which has been going on during several meetings, has convinced him of the impossibility of reaching a conclusion for the present. In voting prematurely upon world obligatory arbitration, we would sow discord among the nations.

His Excellency Mr. **Alberto d'Oliveira** believes it his duty to make answer to this declaration of Baron MARSCHALL, and to make some remarks in defense of the principle of the Portuguese proposition.

The brilliant and thorough discussion which has taken place in regard to this matter, has set into strong light two points of greatly differing importance:

1. Are there any questions that in no way affect the honor and the essential interests of the States, and that are of such a nature as make them susceptible of obligatory arbitration?

[463] 2. How shall obligatory arbitration *be applied* so as to overcome the difficulties of execution of the decisions set forth by Baron MARSCHALL?

The first point is for the moment the essential one. When we shall have

decided that there are such questions, the most important step will then have been taken.

As for the rest, we are ready to accept any suggestions and any modifications, for we realize that in all human affairs—especially in international law—perfection does not exist and we must constantly improve.

In short the discussion has shown that the first point is agreed to. He is happy indeed to state that the first delegate from Germany had at least agreed to it in principle when he formally declared that, in his judgment, certain questions affect in no way the honor and essential interests of the States and are susceptible of being submitted to obligatory arbitration.

Therefore, I ask now that everyone specify and state what, in his judgment, are those questions.

If we agree upon some, we shall take a decisive step, and we shall consecrate by a real agreement upon some cases—no matter what their number and their nature—the general idea of obligation.

The difficulties of application pointed out to us exist now, all of them. It will not be the obligatory arbitration convention that is to give birth to them; quite the contrary; it will mitigate them, and, little by little solve them. We are not here to accomplish a perfect work, but to improve upon the work already accomplished.

His Excellency Mr. **Mérey von Kapos-Mére:** To the examination of the matter of obligatory arbitration we have given four lengthy sittings. The discussions have put into relief the numerous difficulties and the grave objections connected with the problem. Under these conditions, it seems to me difficult to reach an absolutely satisfactory solution. Still, it would be regrettable if we could not profit some by the important work we have performed; for this reason I have been preoccupied with the idea of finding a formula of conciliation between the diverse tendencies of the members of the committee. Two alternatives may present themselves: the result of our labors will either be negative, or else it will be unimportant and will require to be completed within a short time.

We have sought for a formula which in both cases would establish:

1. that we are in agreement upon the principle, to wit, that obligatory arbitration may be applied to certain treaties;

2. that certain difficulties exist in the discussion of certain cases upon which no agreement could as yet be reached.

In consequence, the Conference would request the Governments to have the question studied, and the results of this study would subsequently be submitted to a small international committee. In this way a longer list could be established than we might agree upon at this time.

I shall, therefore, draft a proposition in that sense and present it at our next meeting.

His Excellency Mr. **Carlin:** In harmony with the ideas just expressed, the Swiss delegation has formulated the proposition [1] which is before you.

In drafting this proposition we were actuated by the fear that the results likely to be obtained at this time would not be sufficiently important.

If it is adopted, this proposition will present two advantages:

1. to have the idea of obligatory arbitration appear in the convention;

[1] Annex 27.

2. to secure a unanimous vote.

[464] Furthermore, the system which it advocates is of sufficient elasticity to enable those who would go very far in the matter of arbitration, mutually to engage themselves with regard to a large number of cases chosen by them from the list.

As for the States less disposed toward such a course, they might confine themselves to choosing from the same list a restricted number of matters. And those States believing at the present time they cannot bind themselves in respect of any of the matters, would have but to abstain from making any communication.

As regards the Swiss proposition—quite the reverse of that which would take place in the case of the Austro-Hungarian proposition—it would not be necessary to call together a committee; the Governments might successively agree to points 1, 2, 3, 4, etc., without being compelled to call a new meeting.

Thus, during the interval of two Peace Conferences, the idea of obligatory arbitration might of itself develop automatically.

His Excellency Baron **Marschall von Bieberstein**: With Mr. D'OLIVEIRA I am absolutely in agreement upon one point: there are certainly questions of a nature as can be submitted to obligatory arbitration.

But I differ from him in one respect which I shall now explain: I doubt very much that it is possible at present to determine these questions and to come to an understanding that will permit of our forming the list.

Some matter that may be innocent in one part of the world, is not innocent in another.

Again, in normal times, a matter may be susceptible of obligatory arbitration; but when conditions become abnormal, the nature of the question may change and become political.

Our main endeavor should always be directed to maintaining existing treaties.

For the great pacificator which draws the countries together is the net of international conventions concluded by all the States.

That is the essential point.

As for the establishment of a universal treaty for the interpretation of these conventions, this is a comparatively accessory question, a question of second or third rate importance.

We must maintain the existing treaties, especially the universal unions: it would be a real misfortune to form an obligatory list if the result were to lead to the denunciation of these treaties by certain States in order to release themselves from obligatory arbitration.

Let me repeat in concluding that the question is not ripe for action.

Baron **d'Estournelles de Constant** requests the privilege of presenting an observation of a general bearing:

In his ever-ingenious and oftentimes eloquent criticism of obligatory arbitration, his Excellency Baron MARSCHALL VON BIEBERSTEIN argues in the main that the matter is not ripe for action. In my turn, I address myself to his high impartiality to ask him:

Do you believe that the means to bring it to the point of maturity consists in our stopping in the presence of the many difficulties? To be sure, the difficulties are great, but it is for that very reason that we are gathered here, and it is for that

very reason that we must persevere in our efforts that we may solve them. The proof that they are not insurmountable has just been furnished us in a brilliant way, but a moment ago, by his Excellency Sir EDWARD FRY. You will remember the scruples, the apprehensions that our eminent colleague from Great Britain had presented in our preceding meetings with regard to the establishment of a list; it seemed as though it were impossible to bring that about; and yet, it was brought about. In his twofold capacity as jurist and statesman, his Excellency Sir EDWARD FRY, after having called attention to the difficulty, has found a means to overcome it; he found that means within a very few days. You have just listened [465] to the reading of his list. What more of a decisive character do you wish for? After this experience, and that of the other experiences resulting from our discussions, are we now going to stop in the midst of our work and throw away the fruit of our researches and efforts?

Gentlemen, such a course would be impossible; I am, perhaps, better situated than others to estimate the value of these four meetings so full of labor, and necessitated by our deliberations, by the importance of our mandate and by the interest of the subject itself; I am able to compare our present committee with that of 1899 of which I was also the secretary; it will not seem questionable to you if I state that I have followed your discourses with admiration and that the committee of 1907 is indeed worthy of the committee of 1899, but that is the very reason why it must likewise secure results. I know of no assembly that deserves more and has greater chances of success.

Let us not become discouraged by the difficulties that are the causes of our being here; the true means of bringing the question to maturity is to discuss it. Let us discuss it frankly and without reservations. Let us not believe that there is any divergence between us, when on the contrary, identity of interests governs our actions in this matter. There are not two points of view, the view-point of Germany, for instance, or the view-point of France or America; there is but the one point of view as to the past and to the future. We are not discussing a question which must be solved, but one which has been solved many years since, by many States.

I might cite the examples and the pledges given in Europe by Italy, by Spain, by the Netherlands, by Sweden, by Norway, by Denmark, etc. etc., but somebody will rise and state that these States have not among themselves either the neighborhoods nor the difficulties that may divide other Powers. Nevertheless, these difficulties may arise; that did not prevent Italy whose diplomatic prudence and whose experiences are not contested by anybody, from obligating herself through formal treaties, with regard to obligatory arbitration, without heed of possible objections. Where are we to find a more categorical text than that of the first article of one of her recent arbitration treaties? This article reads as follows:

> The high contracting Parties agree to submit to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, all differences, of whatever nature, which may arise between them and which could not have been settled by diplomacy, and even in case those differences have their origin in events previous to the conclusion of the present Convention.[1]

So far for Italy; let us now take some examples outside of Europe, from those new peoples whose magnificent development in economic, intellectual,

[1] Treaty entered into between Italy and Denmark, December 16, 1905; see annex 66.

moral and political realms we can no longer be permitted to disregard. Shall it be said that the Americans have no past! To be sure, their experience is short, but it counts for double and despite all, to what has this experience led? All these so-called irreconcilable States of twenty-five years ago have now signed unreserved obligatory arbitration treaties between themselves, and what treaties they are! Take a look at the collection of the treaties of the Argentine Republic which has been distributed among us this week:

> The Powers undertake to submit to decision by arbitration all controversies of whatever nature which, for any cause whatsoever, may arise between them. . . .[1]

And again:

> The Powers bind themselves to submit to arbitration. . . .[2]

And, gentlemen, you will recall that this last treaty has had for its complement an explicit convention of disarmament.

[466] A similar treaty of arbitration entered into with Spain, September 17, 1903, and with Bolivia, February 3, 1902.

The very recent treaty of September 7, 1905, between Brazil and the Argentine Republic declares that the signatory Powers *bind themselves* to submit to arbitration all controversies that might not have been settled by direct negotiations.

Of course, it is understood that these treaties contain a clause affirming the respect of the constitution of each State, but you are not unaware of the fact that Brazil has inscribed the principle of arbitration in its very constitution. Are we to behold in all this but insufficient germs or ephemeral symptoms? Can we along the same line of action, forget the great effort of North America and President Roosevelt himself?

Gentlemen, I shall not further insist; facts speak louder than words. They will soon be known to all and recorded as a rule for our modern world. What will they think of our oppositions thereto? Baron Marschall has made us realize it when in one of his recent discourses, he measured the progress accomplished since 1899. That which yesterday seemed impossible, is now realized, and to-morrow our hesitations will seem inconceivable to those who are following our labors.

Let us take care that an anxious public opinion may not offer explanations for these hesitations; let us take the forward step which it demands; let us not allow ourselves to be hypnotized; let us not furnish grounds for saying that we have lost our way in the negative contemplation of obstacles; let us give heed to the unanimous aspirations of the peoples whom we here represent and who expect results from us.

His Excellency Baron **Marschall von Bieberstein** is pleased with the words that Baron d'Estournelles has just uttered with such an eloquent conviction. He thanks him for those words, for they offer him the opportunity of further accentuating his point of view.

[1] Treaty with Paraguay, November 6, 1899, and with Uruguay, July 8, 1899; see annex 63.

[2] Treaty with Chile, May 28, 1902.

With him I am in agreement as to the goal to be attained. Our divergence bears only upon the course to be followed.

I am in no way an adversary of obligatory arbitration, and Baron D'ESTOURNELLES might have referred to the numerous treaties by which Germany has acknowledged the principle of it, especially in eight treaties of commerce. We are entirely ready to increase the number of them and frankly to follow along that road.

But it is one thing to conclude obligatory arbitration treaties with certain countries, with full knowledge of the facts, and it is another thing to bind oneself for all matters with all the world.

We have seen the difficulties that arise when the attempt is made to impose obligatory arbitration upon the world for a series of treaties of which the contents had not been thoroughly studied. On the contrary, if States continue to conclude among themselves treaties containing the clause of obligatory arbitration, its principle will gain more ground than if it were included in a universal treaty, surrounded with precautions and reservations.

Let me repeat: if the States continue to multiply the *compromis* clauses, and if, at the same time, we give to the world an institution worthy of this confidence, such a one as the Permanent Court, we shall have caused arbitration to take the greatest step forward of which it is at present susceptible.

The list of obligatory cases that we might establish to-day, would indeed be too small and more or less of an anodyne nature.

Baron D'ESTOURNELLES will acknowledge that we are agreed as to the basic principle; both of us desire the success of obligatory arbitration, but by different roads.

He has said that the best means to bring the question to maturity will be not to multiply the objections. I believe, on the other hand, that we shall [467] have done profitable and good work by pointing out the difficulties of application, and later on, when we shall reread the minutes of our committee it will be found that, if unfortunately the question is not sufficiently matured, we shall at least have done much towards its maturity.

His Excellency Sir **Edward Fry**: In these few meetings, I believe, as Baron MARSCHALL does, that we have heard and learned much. But, with Baron D'ESTOURNELLES, I believe that to-day we are better informed than we were at the beginning of our labors. The time has come to bring our labors to a conclusion; I ask that each of us take a final attitude and express himself upon all of the points of the Portuguese list, paragraph by paragraph.

The British delegation did not hesitate to find out and to make known in advance those points it is ready to accept; it desires that each should do the same and that we now pass to the vote.

His Excellency Mr. **Nelidow** believes that it is his duty to take part in the discussion for the purpose of making an observation regarding the subject of the proposition of the Swiss delegation to adjourn.

The list which has been presented to the Conference seems to him a rather long one: many of the delegates will find it difficult to *recommend it* to their Governments. As for himself, he would, for instance, be ready to admit some of its points, but how would it be possible for him to indicate, as susceptible of being submitted to obligatory arbitration, questions regarding which he could

not engage the signature of Russia? It will, therefore, be prudent to carefully examine that list and to vote upon it paragraph by paragraph.

His Excellency Mr. **Carlin** states that he has deliberately drawn up a very long list, in order to make it possible to subscribe to many cases, without, however, being compelled to accept the full number. He has inserted, for instance, matters such as extradition which Switzerland could not accept: but other States might be inclined to bind themselves with regard to this matter, and we must not prevent them from doing so. The particular advantage of the Swiss list lies in the fact that it may be extended without engaging ourselves, or reduced, while still retaining a rather important list. His Excellency Mr. CARLIN admits, however, the correctness of the objection raised by his Excellency Mr. NELIDOW, and, in a new revised edition of the Swiss proposition which he reserves unto himself the right to make, he will take it into account.[1]

His Excellency Mr. **Alberto d'Oliveira** supports the motion of his Excellency Sir EDWARD FRY to the effect that his proposition should be voted upon point by point.

The **President** then summarizes the discussions.

I agree with Baron MARSCHALL that the discussions we have just had have been most useful; but unlike himself, I am not pessimistic; the discussions have but confirmed me in my optimism. For they have been a display of a real rivalry to see who of us would better advance the cause of obligatory arbitration.

The only point which is not clear is that of finding out if the question is sufficiently matured. Well, it is upon this matter that we are going to vote.

The fundamental objection to the conclusion of a universal obligatory arbitration treaty is the following:

If there are a number of cases that have already been accepted in treaties concluded between one State and another State, it is more difficult to include these same cases in a treaty between all the States.

This is certainly difficult. But it is for this very purpose, that is to say, for solving these difficulties, that there is now a Conference gathered at The Hague, and it may be said, that the exceptional and unprecedented importance of our assembly is proportionate to the exceptional importance of the problem to [468] be solved. Our discouragement would be inadmissible; we have to fulfill our mission; we shall examine whether or not, in the totality of human affairs, there is a body of questions that can be included in a general obligatory arbitration treaty. We shall examine, and we shall put each question to a vote, paragraph by paragraph, and to each question we shall answer by a yes or a no.

His Excellency Baron **Marschall von Bieberstein** desires to defend himself against the accusation of pessimism made against him.

He has, on the contrary, the greatest confidence in the future of obligatory arbitration. But he believes that this future will be the better assured if we leave to the States, at present, the possibility of concluding individual treaties. This will be more profitable than to exact from them, at the present time, a general understanding upon some trifling points. The Swiss delegation has grasped this idea, and I agree thoroughly with the spirit of its proposition.[2]

[1] Annex 28.
[2] *Ibid.*

The **President**: Allusion has been made to the exceeding length of our labors. More than anyone else in your midst, I should wish for their swift unfolding without their ceasing to be fruitful. But we do not have command over ideas; it is the ideas that have command over us. We cannot confine this or that question within strict limits. All of us are here under a great responsibility and our desire to conclude our labors must vanish before our desire *to accomplish something.* Therefore, gentlemen, I make an appeal to the patience of all of you. If we are to oppose negations to the problems put before us, it is yet necessary that the reasons for these negations should be stated.

I pass on to another matter. In the course of our discussions, allusion has been made to the utility there would be in subdividing the conventions relative to the railways, into special chapters more susceptible of obligatory arbitration than others. This presents an inquiry analogous to that dealing with treaties of commerce and navigation. Therefore, I request Messrs. LAMMASCH, LOUIS RENAULT, KRIEGE and CROWE to constitute themselves into a subcommittee, of which, of course, Mr. GUIDO FUSINATO shall, of right, be a part as adjunct president, for the study of this matter. This question might also include that of treaties of repatriation, of geodetical conventions and others that have been suggested by Mr. GUIDO FUSINATO.

After having been consulted, his Excellency General **Porter** states that he is not prepared immediately to discuss his proposition [1] with regard to the matter of contract debts, because of certain changes that he will have to make in it.

The discussion will continue, therefore, at the next meeting, with regard to the final points of the Portuguese list.

The meeting closes at 5: 30 o'clock.

[1] Annex 50.

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ELEVENTH MEETING

AUGUST 23, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10: 15 o'clock.

The minutes of the ninth meeting are adopted.

The **President** calls attention to the fact that the reading of the articles in the Portuguese list,[1] concerning the cases of obligatory arbitration, has been completed. If no one wishes further to discuss any one of the clauses, the moment has come when the committee is to give its judgment by a vote.

Before passing to the vote, the PRESIDENT, however, requests those members who might wish to make remarks upon the whole matter of the projects, to be good enough to present them now.

His Excellency Baron **Marschall von Bieberstein** makes the following statement:

Article 16 *b* declares that disputes concerning the interpretation and the application of a series of conventions and of international arbitration treaties shall be obligatory without any reservation whatever. The committee of examination has found it impossible thoroughly to examine the numerous international stipulations contained in the list. To our judgment, however, such an examination would have been indispensable.

We have signalized certain grave inconveniences that would not fail to arise.

1. Contradictory arbitral decisions concerning the interpretation of universal treaties which will threaten the very existence of these treaties;

2. Arbitral decisions in contradiction with judicial decrees of national courts called upon to interpret and to apply international treaties, would create an impossible situation;

3. Arbitral decisions declaring that a State must modify its legislation in virtue of an international treaty might lead to serious conflicts with the legislative branches.

None of these questions could be solved by the committee of examination.

The German Government is inclined to insert into international treaties
[470] to be concluded, the obligatory *compromis* clause for stipulations permitting thereof; but in a world treaty, it cannot assume engagements whose importance and effect it is absolutely impossible to foresee.

His Excellency Baron **Guillaume** speaks as follows:

Faithful to its sympathies to obligatory arbitration the Belgian delegation

[1] Annex 19.

is disposed to accept Article 3 of the Portuguese propositions,[1] on the condition that cases that might prove of such a nature as to affect the security and the sovereignty of the State be reserved.

A conscientious study of the matters regulated by the conventions concluded by Belgium in the last seventy years, shows that save certain exceptions and without reference to our few political treaties that are not here in question, many of these come within the enumeration of this Article 3.

In these conditions, an engagement not to invoke the reservation of the essential interests of the State, would bear upon the greater number of our conventions.

In some respects this Article 3 would become the rule for us; the principle enunciated in Article 1 of the Portuguese proposition would hardly ever receive any practical application. We cannot believe that it was the intention of the authors of the project to take back by means of Article 3 that which they stipulated in Article 1.

We believe that with regard to any treaty it is impossible to foresee if, in certain definite circumstances, its interpretation or its application may not bring up questions of such a nature as might involve the sovereignty and the security of the States. Such an observation has already been made; no satisfactory answer has been made to it.

For those who do not share our point of view, the reservation which we request to be inscribed will be inoperative; we cannot believe that it may be harmful. To wish to read into it any easy pretext for avoiding recourse to arbitration in cases where it might seem it ought to be obligatory, would be to point to the possible bad faith of the parties. Bad faith may be met with in the carrying out of all engagements, no matter of what nature, but it should not be foreseen in the texts.

In the great majority of the disputes that may arise from the conventions enumerated in Article 3 of the project now before us, it would not be possible to invoke the essential interests, the independence, or the national honor. We must, all of us take into account public opinion, and moral obligations are not the easiest to be removed.

Mr. D'OLIVEIRA himself has told us so when he referred to the reservations inscribed in Article 1 of the project which he advocates both with talent and eloquence. I ask him to permit me to make his words my own.

> There is no doubt but that a State acting in bad faith may always find a means by which to avoid having recourse to arbitration; but emphatically engaged to have recourse to it, it will be forced to give reasons for its refusal, and then its difficulties will begin. Its reasons cannot remain secret; they will be the object of public discussions, of newspaper comment, of the deliberations of learned societies, and of the criticisms of the entire civilized world. If they are bad and unavowable, it will be in an embarrassing position before public opinion; it will expose itself to being condemned, and by itself, this condemnation will constitute for the other party an appreciable moral satisfaction, and to a certain extent will be a compensation for the prejudice occasioned.

I could not better express the idea, and I wish that the authors of the Portuguese project may bear these words in mind. Through a conciliating modifica-

[1] Annex 19.

tion of the terms of Article 3, I ask them here, with insistence, to afford us the very sincere satisfaction of enabling us to agree to their project.

We accept its first two articles on the condition of two modifications of the text of Article 1 intended, on the one hand, to emphasize the juridical na-
[471] ture of the differences submitted to obligatory arbitration, and, on the other hand, to settle the rather delicate question of the interpretation of conventions concluded by several Powers. At an opportune time I shall indicate them.

We are inclined to admit almost the entire enumeration inscribed under Article 3 destined to stipulate, for the application and interpretation of the conventions there inscribed, recourse to arbitration of a more special obligatory character, and we should be pleased to see that the Convention declare for these classes of disputes, that the reservation of essential interests could not be invoked except in the very definite and exceptional cases, especially in the hypothesis where the security or the exercise of sovereignty were involved. We believe that, reduced to these proportions, the restriction placed upon the obligatory character of arbitration cannot give rise to any objection, and that it must meet the thought of all; for no State can admit that the exercise of its sovereignty may be submitted to an arbitral decision.

His Excellency Count **Tornielli**: At the moment when we are to proceed to vote, the Italian delegation wishes to explain its vote and at the same time set into relief the substance of the question.

Apart from any consideration whatever, of any sort, and remaining exclusively within the field of the common desire to insure to the principle of arbitration all the worth that public opinion attributes to it, two currents of opinions have disclosed themselves.

On the one hand, it is thought that the proclamation of the principle of obligatory arbitration, unanimously accepted by the Second Peace Conference, as compared with what took place in 1899, is of the highest importance. Those who think thus are inclined to believe that the importance and the seriousness of this declaration would in no way be diminished by the statement that the present Conference would in itself not be ready to specify those cases in which the principle of obligatory arbitration might be applied.

On the other hand, a certain number of States have shown their solicitude for taking immediate and final engagements with regard to the application of the principle to a certain number of points. To this thought is due the presentation of the different lists that several States have proposed to us. These lists have not only been examined in detail, but we have succeeded in selecting from them various cases of obligatory arbitration.

In this work the committee has certainly shown the most sincere desire to reach an acceptable conclusion. The question is, has the committee realized that object? The Italian delegation believes that, as things now are, the question of accepting the system proposed by Portugal and by the other States, and of accompanying the declaration of the principle of obligatory arbitration with a vote upon the lists, is not prejudged by the acceptance or the refusal of points that are going to be put to a vote, and, as concerns the Italian delegation, it reserves the right to state its attitude upon this matter when the vote upon the points shall have been closed and when it shall be possible to form an opinion as regards the importance of the list which will result therefrom.

The delegation wishes likewise to state that the refusal on its part to admit certain points does not mean that its Government will not later accept some and even all these points. Its refusal solely means that it does not believe it is authorized to engage, at this time, the royal Government by votes for which it is not sufficiently prepared.

The Italian delegation desires, furthermore, to state that the application of the principle of obligatory arbitration to conventions establishing rules to be uniformly applied to private individuals within the territory of each contracting State, has led to lengthy discussions in the committee of examination.

[472] Regardless of that which constituted the gist of these discussions, it is indeed necessary to recognize that the difficulties which may arise with regard to these conventions are of such a nature that they may be better settled by a real, permanent, international, judicial court than by arbitral justice.

For these reasons, the Italian delegation will abstain from voting with regard to numbers 9, 10, 11, 17 and 18 of the Portuguese proposition,[1] and it expresses the desire that, "the existing Conferences for the codification of private international law should study the means of guaranteeing uniformity in the application and in the interpretation of the uniform rules of private national or international law."

His Excellency General **Porter**: I have taken no active part, gentlemen, in the very interesting and instructive discussions that have taken place in the committee, for the reason that I am without explicit instructions from our Government with regard to the matters brought to discussion. A week ago, I had already sent to my Government a telegram asking for such instructions. I have only this morning received the awaited answer.

> My Government is an ardent supporter of obligatory arbitration and it highly appreciates the relative merits of the many propositions submitted for our consideration. But it knows the difficulties of a practical application thereof, and it believes that every proposition containing a list of conventions which are excepted from the general article setting forth the reservations, instead of simplifying the question, would raise serious complications. It would be necessary, further, to take a relatively long time to study in a thorough manner the character and scope of each of these conventions.
>
> The American Government also prefers a formula more familiar to the nations than the one proposed, which is entirely unknown and a matter of experiment.
>
> Consequently, our Government, while being—I repeat it—an ardent supporter of obligatory arbitration, could not authorize us to vote in favor of a proposition containing a list of the conventions to be submitted to obligatory arbitration.

His Excellency Mr. **Mérey von Kapos-Mére** makes the following declaration:

In the last meeting of this committee I rather thought that the long and very interesting discussion of the matter of obligatory arbitration would not lead to any practical and satisfactory result. It was under the sway of this thought that I took the liberty of tracing in large outline and in a concise manner the draft of a resolution which I desired to propose for your adoption.

[1] Annex 19.

Until this day I had reserved to myself the privilege of submitting to you the text of the resolution as I had drafted it and to explain my proposition.[1]

But, it has since then been decided that we should vote first upon the different points of the Portuguese proposition. I am in no way opposed thereto, and the more so because I desire to prove by my vote that I am not a mere platonic partisan of obligatory arbitration.

Yet, I must subordinate my vote to certain conditions whose exact object it is to contribute to giving to the result of our votes a serious and practical character. The first of these conditions is as follows:

As we are called upon to prepare, that is to say, to indicate the decision which is to be taken by the First Commission and then by the Conference, and as we are not considering reaching a limited agreement, my vote is not given and shall not be definitive except upon the condition that, if not all, at least almost all of our colleagues are inclined to enter upon a similar engagement.

As, moreover, according to an expression used by our eminent President, we are considering "making an experiment" within the field of obligatory arbitration, it would seem to me to be necessary to limit the duration of *the eventual stipulation to a period of at most five years.*

[473] According to the result of the vote, I shall, of course, reserve unto myself the privilege of eventually taking up again my draft resolution.

His Excellency Mr. **Carlin** expresses himself as follows:

At the moment of proceeding to the vote, I desire to state that at the present time, my Government does not believe that it is sufficiently informed as to the nature and the scope of the differences that might arise with regard to the matters specified under the letter A of the proposition of the Portuguese delegation (new draft).[2] I must, therefore, reserve my vote upon these matters, as well as upon letter B of Article 16 *b*, whose text has been modified since our last meeting.

As to the letters C and D, regarding which I have been instructed to vote in the negative, I have the honor to refer to the declaration made by the Swiss delegation in the meeting of the First Commission, first subcommission, on July 18 last.

His Excellency Mr. **Ruy Barbosa** makes the following statement:

Before taking part in the vote upon the various points of the list of obligatory arbitration cases, to a large number of which it gives its adhesion, the Brazilian delegation desires to state once more that, whatever stipulation may be adopted, such stipulation will not obligate it to submit to arbitration controversies in which the national courts might already have rendered a decision.

His Excellency Mr. **Mérey von Kapos-Mére** is in favor of the reservation made by the first delegate from Brazil.

Mr. **Georgios Streit**: I am not at present able to state if the Greek delegation will be able to accept any one of the categories specified in the Portuguese project, without the clause of vital interests and of national honor; up to the present time, my instructions do not permit me to do so. The Greek delegation is, therefore, obliged to again abstain from voting upon this matter, while it is yet not unfavorable to the principle of obligatory arbitration which it does not regard as incompatible with the said reservation, if it is interpreted in a strictly juridical sense.

[1] Annex 38.
[2] Annex 34.

His Excellency Baron **Marschall von Bieberstein** expresses himself in the following terms:

The arbitral system foreseen by Articles 16 and 16 *a* of the Portuguese proposition is but obligatory in form. In its essence it is optional, because its application depends on the free will of each State which alone is able to decide whether a difference involves its honor, its independence and its vital interests. These words are so indefinite and elastic that, in a general treaty concluded by all the States of the world, they cannot constitute a solid basis for its interpretation and its application. Arbitration would not even be optional in those States where, according to the constitutions, the *compromis* shall have to be sanctioned by a legislative factor, and in consequence its realization would be completely independent of the will of the Government. We will not be able to accept those paragraphs. During the last eight years obligatory arbitration has made great progress. A series of treaties including it has been concluded between different States. If the Conference accepts our propositions directed to assuring in all cases the conclusion of the *compromis* which is the necessary and indispensable corollary of obligatory arbitration, and if we establish a Permanent High Court, according to the proposition [1] of the United States of America, we would indeed witness true and real progress.

[474] His Excellency Mr. **Francisco L. de la Barra** states that the Mexican delegation is in favor of the Portuguese list under the reservations indicated by the first delegates from Austria-Hungary and Brazil.

His Excellency Mr. **Martens** repeats that the Russian delegation believes that it would be very difficult to vote upon a list of conventions that one would obligate oneself to submit to obligatory arbitration without reservations.

By taking a practical point of view, it believes that it is necessary to determine some matters to which his Excellency Mr. MARTENS has already previously alluded, as for instance: the provisions of private international law, the regulation of commercial companies, questions relating to civil or penal procedure —pecuniary claims for damages when the principle of indemnity is recognized by the signatory States.

The Russian delegation believes that it would be difficult to vote upon a series of *conventions* whose contents have not been examined, and whose scope and importance are not realized.

His Excellency Sir **Edward Fry** states that the English delegation will give a favorable vote, provided that the English Articles 16 *a* and 16 *b* [2] are also accepted, and provided that by a well-defined list it may be possible to secure, if not a unanimous approval, at least a general or almost general approval.

In case this approval were not obtained, the English delegation is of opinion that it would be preferable to leave to each nation its freedom of action.

His Excellency Mr. **Hammarskjöld** desires to recall that, foreseeing the difficulties which have arisen, he had presented a proposition more limited than that of Portugal. He hopes that it will also be put to a vote after the latter.

He states that he shall, nevertheless, vote for a large portion of the Portuguese list provided that it secure here a unanimous or an almost unanimous vote.

His Excellency Mr. **Milovan Milovanovitch** proposes that the vote bear

[1] Annex 76.
[2] Annex 32.

in the first place upon the list. For the general provisions of Articles 16 and 16 *a* are, in his opinion, of a secondary nature, and the list itself is the main thing. The first two articles which really have no legal importance must only be accepted as complementary provisions.

Mr. **Lange,** referring to the statements which he submitted to the plenary Commission, repeats that the Norwegian delegation continues in the most favorable disposition to the Portuguese proposition,[1] and that it accepts not only the Portuguese list, but also the two cases contained in the Swedish list.

On the other hand, Mr. LANGE does not at all concur in the opinion expressed by his Excellency Mr. MILOVAN MILOVANOVITCH. He believes, on the contrary, if it is desired to give very extended development to international arbitration, the general formula inscribed at the head of the Portuguese project has a special importance, and must retain its place in the convention to be concluded and dominate it with all its affirmative value of principle.

His Excellency Baron **Marschall von Bieberstein** states that the new Portuguese list[2] contains parts that have not as yet been discussed, such for instance, as those dealing with the taxes required of vessels, the gauging of vessels, the equality of foreigners and nationals in regard to taxes and imposts. This fact, so far as he is concerned, makes the proposition even more unacceptable.

The **President** explains that the Portuguese proposition has not been modified, but that the analysis made of it by the committee of his Excellency Mr.
[475] HAMMARSKJÖLD, in order to determine the matters susceptible of obligatory arbitration, led of necessity to an increase of that list.

His Excellency Marquis **de Soveral** remarks that the Portuguese list has in effect not been corrected, but completed by that of the British delegation; he is, therefore, happy in asking that the British list should be taken by the committee as the text upon which the vote shall take place.

His Excellency Count **Tornielli** requests that before the vote is proceeded with, two distinct votes be taken with regard to the article dealing with the monetary system and with weights and measures.

It is so decided.

The general discussion is terminated.

The **President**: Having come to an end of our general discussion, we shall now proceed with the vote upon each point of the propositions from the United States of America, from Great Britain, from Portugal, etc., relative to obligatory arbitration.[3]

Before proceeding with the vote, I deem it necessary to state three things.

The first is that, whatever may have been the difficulties, warmth and sometimes the vivacity of our discussions, a common feeling has issued from them that unites us all.

It may indeed be said to be the unanimous will of the members of the committee of examination that obligatory arbitration should issue triumphant from the Peace Conference. All of us, each in his turn, have expressed this will, and Baron MARSCHALL has done this in particularly felicitous terms. Upon the

[1] Annex 19.
[2] Annex 34.
[3] Annexes 32, 34, 37.

principle we are, therefore, in agreement, and we must proclaim it openly. (*Applause.*)

In the second place, the discussion has had the result of bringing forth difficulties of which we had forebodings in the very beginning. Thus, at the very first meeting, sharp criticism was directed against the system which consists of submitting to obligatory arbitration whole groups [*ensembles*] of treaties. Thanks to the patient labors of several of our colleagues, particularly Messrs. HAMMARSKJÖLD and FUSINATO, the questions submitted to your examination are all defined by the determination of the object. We have, therefore, agreed upon this second point: to clear up the problem and to have before us, not treaties taken in their totality, but particular cases viewed in their objective reality.

Finally, we have reached an understanding upon a third matter. Baron MARSCHALL has told us that with regard to the treaties to be concluded and when the matter permits of it, Germany was in favor of having obligatory arbitration become the international practice. Gentlemen, this customary adoption of the *compromis* clause constitutes for the future, as it were, a rule of conduct which will impose itself morally upon the international community.

Our agreement upon these diverse principles having thus been reached, the question now arises as to whether or not it is possible to establish even now between ourselves, a legal bond with regard to definite arbitration cases.

I thank Count TORNIELLI for having suggested the best method of voting in order that we may reach an understanding upon this latter point.

I believe that we can, as he has suggested, take successively each of the articles submitted to us and make known our judgment upon each of them without in any way obligating ourselves thereby with regard to our final vote.

We shall thus remain the masters of our united decisions to the end of the discussion, and the results of these particular votes will enlighten us and guide us in our definitive resolutions.

[476] Gentlemen, if you are willing to associate yourselves with me in these various considerations, greater ease in the discussion will result, which will bring us near to the object that we have constantly in view: to issue from here in agreement.

The PRESIDENT proposes, in consequence, to bring to discussion the first articles of the proposition of the United States of America which seem to summarize the first articles of the other propositions.

The PRESIDENT reads aloud Article 1 of the project of the United States of America:[1]

ARTICLE 1

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

His Excellency Marquis **de Soveral** states that he accepts the American text of this article.

[1] Annex 21.

The **President** puts to a vote the different amendments proposed to this text.

By a vote of 9 against 7, the committee declines to accept the proposition to inscribe the word *"exclusively"* before *"legal."*

On the other hand, by a vote of 7 against 4, the committee accepts the substitution of the words *"and in the first place, those"* for the word *"or."*

No vote is taken upon the amendment of the Belgian delegation proposing that "arbitration treaties and arbitration clauses included in treaties already concluded or to be concluded should remain reserved," for the reason that an almost similar clause appears in paragraph 16 *b* of the English proposition.[1]

His Excellency Baron **Guillaume** subordinates his vote upon Article 1 of the proposition of the United States of America to the adoption of the British Article 16 *b*.

The committee adopts the word *"arbitration"* in the place of the words *"of the Permanent Arbitration Court, etc."*

The formulas proposed in Article 1 with regard to the reservations are then taken up.

"Vital interests" and *"independence"* are adopted without remarks or without a vote.

As to the expression *honor,* Mr. **Lange** states that he is opposed to it as being too indefinite and lending itself too easily to a subjective and arbitrary interpretation. Moreover, Mr. LANGE cannot imagine anything more dishonoring for a State than invoking its *"honor"* to elude an obligation conventionally contracted for submitting disputes to arbitration.

The committee retains that expression by a vote of 10 against 4.

The committee retains likewise the words *"or the interests of third Powers"* omitted in the Portuguese proposition.[2]

Article 1 of the proposition of the United States of America thus worded is adopted without further remarks.

[477]

ARTICLE 1

Differences of a legal nature, and in the first place those relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

ARTICLE 2

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

The program of the day now calls for a vote upon the arbitration cases, as has been decided. It is upon the British proposition [1] that the committee shall begin to give its judgment, article by article.

The **President** reminds the members of the fact that the votes now to be

[1] Annex 32.
[2] Annex 34.

cast will not be final, and that they constitute a factor of appreciation in order to secure a vote upon the whole proposition.

He reads aloud the following three articles:

ARTICLE 16 *a*

The high contracting parties agree to submit to arbitration without reserve disputes concerning:

A. Interpretation and application of treaty provisions concerning the following matters:

1. Customs tariffs.
2. Measurement of vessels.
3. Wages and estates of deceased seamen.
4. Equality of foreigners and nationals as to taxes and imposts.
5. Right of foreigners to acquire and hold property.
6. International protection of workmen.
7. Means of preventing collisions at sea.
8. Protection of literary and artistic works.
9. Regulation of commercial and industrial companies.
10. Monetary systems; weights and measures.
11. Reciprocal free aid to the indigent sick.
12. Sanitary regulations.
13. Regulations concerninig epizooty, phylloxera and other similar pestilences.
14. Private international law.
15. Civil or commercial procedure.

B. Pecuniary claims for damages when the principle of indemnity is recognized by the parties.

[478]

ARTICLE 16 *b*

It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 16 *c*

Article 16 *a* does not apply to disputes concerning provisions of treaties regarding the enjoyment and exercise of extraterritorial rights.

His Excellency General **Porter** states that the delegation of the United States of America will abstain from voting upon the list, not having as yet received any instructions from its Government.

Vote upon point 1: *Customs tariffs.*

His Excellency Mr. **Milovan Milovanovitch** proposes the addition to this paragraph of a phrase reading as follows:

> and other dues which, under whatever heading they may appear, are levied upon merchandise at their entering or at their going out or on their transit.

His Excellency Sir **Edward Fry** is not opposed to having this addition put to a separate vote.

Mr. **Guido Fusinato** asks if, having excluded the disputes affecting the interests of third Powers, the treaties containing the clause "of the most favored nation" would be susceptible of obligatory arbitration.

His Excellency Sir **Edward Fry** makes answer by stating that the words "*without reserve,*" contained in paragraph 1 of the Article 16 *a* are applicable to all the points of the list.

His Excellency Mr. **Ruy Barbosa** declares that for the moment he will abstain from voting.

Mr. **Lange** calls for the vote by roll call.

There are present 18 voters.

Voting for, 9: France, Great Britain, Italy, Mexico, Norway, the Netherlands, Portugal, Serbia, Sweden.

Voting against, 2: Germany and Belgium.

Abstaining from voting, 7: United States of America, Austria-Hungary, Argentine Republic, Brazil, Greece, Russia, Switzerland.

The **President** puts to a vote the supplementary proposition of his Excellency Mr. MILOVAN MILOVANOVITCH. (See above.)

The proposition is not adopted.

Vote upon point 2: *Measurement of vessels.*

Voting for: 11.
Voting against: 4.
Abstaining: 3.

[479] Vote upon point 3: *Wages and estates of deceased seamen.*

Voting for: 10.
Voting against: 3.
Abstaining: 5.

Vote upon point 4: *Equality of foreigners and nationals as to taxes and imposts.*

Voting for: 10.
Voting against: 4.
Abstaining: 4.

Vote upon point 5: *Right of foreigners to acquire and hold property.*

Voting for: 9.
Voting against: 5.
Abstaining: 4.

Vote upon point 6: *International protection of workmen.*

Voting for: 11.
Voting against: 2.
Abstaining: 5.

Vote upon point 7: *Means of preventing collisions at sea.*

Voting for: 11.
Voting against: 2.
Abstaining: 5.

Vote upon point 8: *Protection of literary and artistic works.*

Voting for: 9.
Voting against: 4.
Abstaining: 5.

Vote upon point 9: *Regulation of commercial and industrial companies.*

His Excellency Mr. **Milovan Milovanovitch** wishes to know if insurance companies are included in this term.

His Excellency Sir **Edward Fry** replies in the affirmative.

Voting for: 9.
Voting against: 4.
Abstaining: 5.

Vote upon point 10; first part: *Monetary systems.*

Voting for: 9.
Voting against: 4.
Abstaining: 5.

[480] Vote upon point 10; second part: *Weights and measures.*

Voting for: 11.
Voting against: 3.
Abstaining: 4.

Vote upon point 11: *Reciprocal free aid to the indigent sick.*

Voting for: 12.
Voting against: 2.
Abstaining: 4.

Vote upon point 12: *Sanitary regulations.*

Voting for: 9.
Voting against: 7.
Abstaining: 2.

Vote upon point 13: *Regulations concerning epizooty, phylloxera, and other similar pestilences.*

Voting for: 8.
Voting against: 6.
Abstaining: 4.

Vote upon point 14: *Private international law.*

Voting for: 9.
Voting against: 3.
Abstaining: 6.

Vote upon point 15: *Civil or commercial procedure.*

Voting for: 9.
Voting against: 4.
Abstaining: 5.

Upon the request of Mr. **Lange,** the **President** then puts to a vote those numbers of the Portuguese list [1] not appearing upon the list of Great Britain.[2]

[1] New draft, annex 34.
[2] Annex 32.

Vote upon No. 2: *Taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck.*

Voting for: 8.
Voting against: 7.
Abstaining: 3.

Vote upon No. 5: *The right of foreigners to pursue commerce and business, to practice the liberal professions, whether it is a case of a direct grant or of being placed upon an equality with nationals.*

Voting for: 5.
Voting against: 9.
Abstaining: 4.

[481] Vote upon No. 10: *Patents, trade-marks, and trade name.*

Voting for: 4.
Voting against: 9.
Abstaining: 5.

Vote upon No. 12; third part: *Geodetic questions.*

Voting for: 6.
Voting against: 7.
Abstaining: 5.

Vote upon No. 13; second part: *Conventions providing for repatriation.*

Voting for: 8.
Voting against: 6.
Abstaining: 4.

Vote upon No. 14: *Emigration.*

Voting for: 5.
Voting against: 6.
Abstaining: 7.

His Excellency Mr. **Asser** states that he had prepared an amendment to Article 16 looking to the prevention of possible conflicts between the national courts and the arbitral courts, conflicts to which Baron MARSCHALL had alluded. He does not, however, present this amendment as a proposition because he realizes that no world convention will be agreed upon. He will have it distributed nevertheless, and would wish to have it annexed to the minutes.

Mr. ASSER reminds the committee of the fact that the Netherlands has ever been an enthusiastic partisan of obligatory arbitration; for instance, the Convention concluded with Denmark which contains no reservation and which *the other Powers are free to join.* We have, therefore, gone as far as possible. If in the present discussion we have submitted our amendment, it was for the purpose of disarming the adversaries of obligatory arbitration and for removing their objections.

His Excellency Sir **Edward Fry** proposes, along the same line of ideas, to add a clause at the end of Article 16 *a* (British project) which would read as follows:

It is understood that arbitral awards shall never have more than an interpretative force, with no retroactive effect upon prior judicial decisions.

His Excellency Marquis **de Soveral** regrets that his Excellency Mr. ASSER withdrew his amendment, for in no way does he share the pessimism of the delegate from the Netherlands as to the conclusion of a world convention. All signs, on the contrary, point to the likelihood of our coming to an agreement.

His Excellency Mr. **Ruy Barbosa** also refers to the importance of the clause that his Excellency Mr. ASSER was about to propose. He states that he had voted the various numbers of the British and Portuguese lists upon the supposition that the principle advocated by his Excellency Mr. ASSER would likewise be accepted. If, on the contrary, we were to establish the principle according to which arbitral decisions may annul national decisions, his Excellency Mr. RUY BARBOSA would have to request further instructions from his Government.

[482] The **President** puts to a vote point B of the British list:[1]

Pecuniary claims for damages when the principle of indemnification is recognized by the Parties.

Voting for: 11.
Voting against: 4.
Abstaining: 3.

His Excellency Mr. **Ruy Barbosa** desires to have it understood that the proposition of General PORTER is not involved at this time.[2]

The **President** replies that, in effect, the proposition of General PORTER is entirely independent of the list of cases which we are discussing; it will be discussed subsequently.

His Excellency Mr. **Hammarskjöld** calls for a vote upon Article 18 of the Swedish proposition as being connected with the matter under discussion. He explains to General PORTER that the Swedish proposition[3] has nothing in common with the proposition of the United States, in view of the fact that it relates only to disputes between States and does not involve pecuniary claims arising from contract debts of the States with individuals.

The **President** puts to a vote Section 2 of Article 18 of the Swedish proposition, reading as follows:

In case of pecuniary claims involving the interpretation or application of Conventions of every kind between the Parties in dispute.

Voting for: 9.
Voting against: 6.
Abstaining: 3.

The **President** puts to a vote Section 3 of Article 18 of the Swedish proposition:

In case of pecuniary claims arising from acts of war, civil war or so-called *pacific* blockade, the arrest of foreigners, or the seizure of their property.

[1] Annex 32.
[2] Annex 21.
[3] Annex 22.

Mr. **Georgios Streit** calls for a division in the vote. He is of opinion that the matter of the so-called pacific blockade does not come within the scope of the Conference.

The **President** puts to a vote the text of Section 3 of Article 18 of the Swedish proposition without the words: *" or so-called pacific blockade."*

Voting for: 7.
Voting against: 6.
Abstaining: 5.

The omission of the words " or so-called pacific blockade " is then put to a vote and adopted by 6 against 2 (10 abstentions).

The PRESIDENT reads aloud Article 16 *b* of the British proposition:

> It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force.

The article is adopted, save the details of the wording.

[483] The PRESIDENT reads aloud Article 16 *c* of the British proposition, reading as follows:

> Article 16 *a* does not apply to disputes concerning provisions of treaties regarding the enjoyment and exercise of extraterritorial rights.

This article is likewise adopted, save the details of the wording.

The PRESIDENT reserves for a subsequent sitting the proposition additional to Article 16 *a*, submitted by his Excellency Sir EDWARD FRY.

The PRESIDENT: Gentlemen, I beg of you to pause and consider these results which are so interesting to contemplate. Our common thought is to obtain from these results an agreement and not a division. The votes cast to-day by way of mere indication will be valuable to us, I feel firmly convinced, in order to reach the desired agreement.

His Excellency Mr. **Carlin** would remark that his participation in the voting of to-day, in so far as he was able to do so, must not be interpreted in the sense that the Swiss delegation renounces the discussion of its proposition. The delegation insists, on the contrary, that this proposition should be brought to discussion at the proper time and in the proper order.[1]

The **President** has special record entered of the statement of his Excellency Mr. CARLIN.

The meeting closes at 1:15 o'clock.

[1] Annex 27.

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TWELFTH MEETING

AUGUST 26, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3: 15 o'clock.

The minutes of the tenth meeting are adopted.

His Excellency General **Porter** has the floor.

He states that he has received new instructions from his Government enabling him to present the following project,[1] of which Articles 1 and 2 are analogous to the articles of the first proposition[2] of the United States, approved in the last meeting:

ARTICLE 1

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

ARTICLE 2

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

ARTICLE 3

Each of the signatory Powers agrees not to avail itself of the provisions of the preceding article in such of the following cases as shall be enumerated in its ratification of this Convention, and which shall also be enumerated in the ratifications of every other Power with which differences may arise; and each of the signatory Powers may
[485] extend this agreement to any or all cases named in its ratification to all other signatory Powers or may limit it to those which it may specify in its ratification.

1. Disputes concerning the interpretation of treaty provisions relating to:

   (*a*) Customs tariffs.
   (*b*) Measurement of vessels.
   (*c*) Equality of foreigners and nationals as to taxes and imposts.
   (*d*) Right of foreigners to acquire and hold property.

[1] Annex 37.
[2] Annex 21.

2. Disputes concerning the interpretation or application of the conventions enumerated below:

(*a*) Conventions concerning the international protection of workmen.
(*b*) Conventions concerning railroads.
(*c*) Conventions and rules concerning means of preventing collisions of vessels at sea.
(*d*) Conventions concerning the protection of literary and artistic works.
(*e*) Conventions concerning the regulation of commercial and industrial companies.
(*f*) Conventions concerning monetary and metric systems (weights and measures).
(*g*) Conventions concerning reciprocal free aid to the indigent sick.
(*h*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
(*i*) Conventions relating to matters of private international law.
(*j*) Conventions concerning civil or criminal procedure.

3. Disputes concerning pecuniary claims for damages, when the principle of indemnity is recognized by the parties.

ARTICLE 4

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter in the constitution of the arbitral tribunal.

ARTICLE 5

It is understood that stipulations providing for obligatory arbitration under special conditions, which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 6

The provisions of Article 3 can in no case be relied upon when the question concerns the interpretation or application of extraterritorial rights.

ARTICLE 7

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

The ratification of each signatory Power shall specify the cases enumerated in Article 3 wherein the ratifying Power will not avail itself of the provisions of
[486] Article 2; and it shall specify also with which one of the other Powers the agreement provided by Article 3 is made with regard to each of the cases specified.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all of the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications including additional cases enumerated in Article 3.

ARTICLE 8

Each of the signatory Powers shall have the right to denounce the Convention. This denunciation may involve either the total withdrawal of the denouncing Power from the Convention or the withdrawal with regard to a single Power designated by the denouncing Power.

This denunciation may also be made with regard to one or several of the cases enumerated in Article 3.

The Convention shall continue to exist to the extent to which it has not been denounced.

The denunciation, whether in whole or in part, shall not take effect until six months after notification thereof in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

His Excellency General **Porter** states that the list of the proposition of the United States could, of course, be regarded only as a test and that it is based upon the Anglo-Portuguese list which is at present under discussion. Other matters might be added to or some might be omitted from it.

The **President** directs that a record shall be entered of the proposition of General PORTER.

It brings before us a text absolutely new which the committee cannot, in consequence, discuss in the present meeting.

What is our object? Finally to reach a general vote, a general agreement, if possible, and constitute between us a legal bond. General PORTER presents one more element for the purpose of attaining this object. Let us study all these elements so that we may combine them and thus reach our supreme goal.

His Excellency Sir **Edward Fry** supports this statement.

His Excellency Mr. **Carlin** calls attention to the fact that the proposition of the United States of America is inspired by the same ideas as the Swiss proposition [1] and calls for a discussion of the latter with which the committee has been acquainted for a long time.

After an exchange of views in regard to this matter, the committee postpones the study of the two propositions and decides that the proposition of General PORTER shall be printed and distributed.

His Excellency Mr. **Mérey von Kapos-Mére** takes the floor and expresses himself in these terms:

To-day we have gathered for the sixth meeting of the committee of examination to discuss the question of obligatory arbitration, a question which stirs us above all others, and which, among all, seems to me to be in truth the only question which—provided that we find a solution thereof, however unsatisfactory—can impress the assembly of which we are a part with the real character of a peace conference. Then, too, in devoting long hours to the study of this problem, as we have done, we have certainly not frittered away our time, and our efforts have not been entirely useless labor.

[487] The energy which we have devoted to this subject, the care which we have taken to examine it from all sides, the high plane upon which we have exchanged our views in this connection, all permit us to report very exactly upon the nature and scope of the problem with which we are concerned.

Our eminent PRESIDENT has praised these discussions by saying that there was real intellectual pleasure in listening to them, and I, for my part, am imbued with the same idea. Our PRESIDENT has very properly stated also that this discussion has in some respects and some measure already produced positive results. For I believe I may apply this term to the statement of a well-considered intention on the part of most of our colleagues to accept the principle of obligatory arbitration. I shall also consider as a positive result the conviction which we have reached in this same discussion that only certain categories of international

[1] Annex 27.

treaties, or certain parts of these treaties, are, in case of divergence of opinion, capable of being submitted to obligatory arbitration. Finally, we can consider as the fruit of our labors the very fact that we have been able to see the difficulties both of a legal and especially of a technical character, which are opposed to the adoption by the Conference itself of the matters which may, without further restriction, become the subject of a provision for obligatory arbitration.

It is with regard to this latter point that I desire to make a further explanation.

With this in mind I stop first, for a moment, upon a question of prime importance which may seem to be simply a question of form, of phraseology, but which, looked at a little more closely, is indeed of the essence of things, and seems to me on more than one point to lead to a conclusion.

In examining questions to see whether they are capable or not of being the subject of an arbitration convention we are unanimous in dividing them into two main groups: differences of a political nature which necessarily are omitted from a general arbitration clause, and disputes of a legal character, the nature of which on the contrary is not opposed in any way to a recourse to arbitration.

Now, among the latter we are accustomed to distinguish to some extent between disputes outside the treaty provisions (legal questions) and those which concern the interpretation or application of international treaties. This customary distinction, which I admit, and which has become a part of the draft presented by the Portuguese delegation, seems to me, however, hardly exact, or at least incomplete, and by simply running through the list of treaties and conventions which according to the Portuguese proposition should be submitted without reserve to obligatory arbitration, we may easily perceive that disputes might arise concerning these international agreements, bearing in the greater number of cases not a legal character, but an almost exclusively technical character.

It seems to me that three conclusions follow from this statement:

1. The necessity for more exact phraseology.

2. The incompetence, not from a legal point of view, but, if I may venture to express it thus, from a technical point of view, of the Permanent Court of Arbitration, both of the institution already bearing this name and of that other which it is intended to create, to pass upon disputes of an essentially technical character and requiring consequently special knowledge and abilities.

3. The incompetence for the same reason of the Conference itself to determine which of the conventions listed in the Portuguese plan would, in
[488] case of dispute, lend themselves either in whole or in part to obligatory arbitration, without mentioning the fact that the Conference would have had barely time enough to make a conscientious study of so delicate a matter.

Do not think, gentlemen, that in the course of my argument I am leading to the statement: Well, since the Conference lacks the necessary power and ability to decide this problem, let us give it up!

This conclusion would perhaps be logical, but there is another which, without being less logical, I believe coincides much better with the sentiments of all of us.

In my view the most desirable course under the circumstances which I have stated would be for the Conference to adopt a resolution based upon the following ideas:

After having considered the subject with all the attention which it deserves,

the Conference can state that there exist within the limits which are still to be clearly and distinctly fixed, certain matters which, in case of dispute, may be submitted to obligatory arbitration without reserve. This method of settlement appears to recommend itself particularly for disputes arising from a difference of opinion as to the interpretation or application of certain international conventions—or parts of conventions—which might be taken from the list appearing in the proposition of the Portuguese delegation.

Now, the matters in question having for the greater part a more or less technical character, we could scarcely avoid a preliminary examination before determining which cases, upon occasion, might be included within the domain of obligatory arbitration in the future. It is evident that the Conference is not competent to go ahead in this matter with a full knowledge of all the details which it must consider; such a task should on the contrary be undertaken by experts versed in the matters in question.

Under these circumstances the Conference hands over to the Governments themselves the duty of taking in hand this preparatory work with a view to reaching an international agreement sanctioning, within the limits which they consider wise, the principle recognized by the Conference.

To make evident, moreover, how important the Conference considers it that the resolution should not become a dead letter, but that it should, on the contrary, be put into practice as soon as possible, it would perhaps be well to determine in the resolution itself a certain period for the respective Governments to study the matter in question, after which the Powers should communicate with each other through the Royal Netherland Government with a view to reaching a solution of the problem.

I have tried to formulate the resolution which I propose to you, and I beg to submit the following text for your consideration, making every reservation as to matters of phraseology:

RESOLUTION

After having conscientiously weighed the question of arbitration, the Conference has finally come to the conclusion that certain matters, carefully specified, are susceptible of submission to obligatory arbitration without any restriction, and that those which lend themselves particularly to this method of settlement are disputes regarding the interpretation or application of certain international conventions—or parts of conventions—appearing
[489] among those which are contained in the proposition of the Portuguese delegation.

Most of the matters in question being more or less technical in character, any decision as to the extent to which and the conditions under which obligatory recourse to arbitration might here be introduced should, however, be preceded by such study as is beyond the competence of the Conference and can be entrusted only to experts, inasmuch as it requires special knowledge and experience. The Conference, therefore, invites the Governments after the close of the Hague meeting to submit the question of obligatory arbitration to a serious examination and profound study. This study must be completed by the . . . at which time the Powers represented at the Second Hague Conference shall notify each other through the Royal Netherland Government of the matters which they are willing to include in a stipulation regarding obligatory arbitration.

I need not add that the plan as it appears to me could not be accepted unless supported by the votes of all, or nearly all, of the delegates.

The resolution which I beg to propose to you would guarantee to a certain extent the application of obligatory arbitration to the matters under discussion: it would at the same time take into account the very proper scruples which the discussion of this subject has aroused in the minds of many of our colleagues, and by ordering a preliminary study of the technical side of the question, it would ensure in the end an agreement of a thoughtful and practical character.

Gentlemen, in laying before you my project, I am not unaware that a proposition somewhat similar to my own has been presented by the Swiss delegation, whose ingenious conception I recognize. Far from me to harbor any idea of criticism! Nevertheless, I believe that this motion will at least make a good impression upon a part of public opinion without, however, giving real satisfaction to those among us who, in matters of obligatory arbitration, would realize results at once tangible and practical.

In my judgment, to realize the proposition of the Swiss delegation would mean—varying a metaphor employed by his Excellency Baron MARSCHALL—to construct a fine front to a house bearing the poster: "for rent"; but tenants would not be in a rush to rent space within the house, or there would be only a few of them.[1]

In comparing the proposition of the Swiss delegation with the one that I have the honor of laying before you, you will find that from a twofold point of view, there is a striking difference between them:

In adopting the Swiss project none of the contracting parties would really obligate themselves to do anything and would yet conform exactly to the stipulations in question, if after having signed they would abstain from any further action. The project which I recommend to your kind consideration contains, on the contrary, by prescribing a study to be completed within a certain period of time and followed by an immediate notification to the other Powers, strict and formal obligations which must be complied with at a definite time fixed in advance. The difference existing between these two propositions will become evident immediately upon the expiration of the period of time provided for therein.

[490] His Excellency Mr. **Carlin** states that he reserves to himself the right to reply in due time to the criticisms to which his Excellency Mr. MÉREY VON KAPOS-MÉRE just subjected his proposition.[2]

The **President** has special record made of the proposition of his Excellency Mr. MÉREY VON KAPOS-MÉRE.

His Excellency Sir **Edward Fry** reads aloud a new proposition[3] from the delegation of Great Britain.

ARTICLE 16

Differences of a legal nature, and especially questions relating to the interpretation of treaties existing between two or more of the contracting States, which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

[1] Annex 27.
[2] *Ibid.*
[3] Annex 39.

ARTICLE 16 *a*

Each of the signatory Powers shall have the right to determine whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which according to the preceding article are excepted from obligatory arbitration.

ARTICLE 16 *b*

The high contracting Powers recognize that in certain disputes provided for in Article 16 there are reasons for renouncing the right to avail themselves of the reservations therein set forth.

ARTICLE 16 *c*

With this in mind they agree to submit to arbitration without reservation disputes concerning the interpretation and application of treaty provisions relating to the following subjects:

1. . . .
2. . . .
3. . . .
4. . . .

etc., etc.

ARTICLE 16 *d*

The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

1. Other subjects which seem to them at present capable of submission to arbitration without reserve.

2. The Powers which, from now on, contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

[491]

ARTICLE 16 *e*

It is understood that arbitral awards shall never have more than an interpretative force, with no retroactive effect upon prior judicial decisions.

ARTICLE 16 *f*

It is understood that stipulations providing for obligatory arbitration under special circumstances which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 16 *g*

Article 16 *a* does not apply to disputes concerning treaties regarding the enjoyment and exercise of extraterritorial rights.

Upon an observation of his Excellency Mr. **Martens** in the interest of the order and the clearness of the discussions, the committee decides, after an exchange of views, that a new synoptic table of all the propositions deposited up to this day shall be drafted by a special subcommittee, composed of the following members:

His Excellency Mr. MARTENS, Messrs. LOUIS RENAULT, KRIEGE, JAMES BROWN SCOTT, EYRE CROWE, GUIDO FUSINATO, HEINRICH LAMMASCH and his Excellency Mr. ALBERTO D'OLIVEIRA.

The **President** asks if there is no other proposition concerning the cases of obligatory arbitration; for it is essential to know, in order to establish a definitive

table of these propositions, what to do in this connection. The committee decides unanimously that the list of the propositions is closed.

His Excellency Mr. **Mérey von Kapos-Mére** reminds the members of the fact that in the beginning of the discussion upon obligatory arbitration, he had proposed an amendment to Article 16 of the Convention of 1899, but that at the time it had been decided to postpone any discussion of general formulas until the time of the detailed examination of the different lists of cases susceptible of being submitted to obligatory arbitration.

He believes that the moment has come again to discuss the general formulas.

The **President** states that the general formulas will be discussed anew and voted upon at the second reading, and that thus the right of each member is reserved. For the time being, we are engaged in the first reading, and the committee has already voted without objection of anybody, the general formula of the first two articles of the project of the United States of America.[1]

The proposition of Mr. MÉREY will, therefore, be brought up for discussion at the time of the second reading.

The **President** requests the members of the committee charged with drafting the new synoptic table to meet immediately, and he then closes the meeting.

It is so decided.

The meeting closes at 4 o'clock.

[1] Annex 37.

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THIRTEENTH MEETING

AUGUST 29, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3: 15 o'clock.

The minutes of the eleventh meeting are adopted.

With regard to these minutes, the **President** desires to state that the words "put to a vote" after the discussion of Articles 1 and 2 of the proposition of the United States of America [1] instead of the expression "adopted without remarks" which is the exact expression, were entered through error.

His Excellency Mr. **Milovan Milovanovitch** takes the floor and expresses himself as follows:

The communication which his Excellency Mr. Asser has made to the committee of examination A concerning the nature of obligatory international arbitration and the relation to be established between it and the national jurisdictions, inclines me to believe that it will not be superfluous if once more, by giving greater precision to it, I develop the opinion which I have had the honor to express in regard to this matter in the course of the preceding discussions. For after having read with the greatest attention this letter of our eminent colleague, I remain firmly convinced that there is neither a juridical reason nor a practical necessity for proposing to put a limitation upon arbitration.

I believe, on the contrary, that if we allow ourselves to enter into this field, we would disregard one of the fundamental principles of international law which, justly connecting the duty of non-intervention with the right to demand the execution of obligations assumed without any restriction based upon the constitutional or legislative character, condemns the conventional stipulations that may grant to a foreigner the right to interest himself in the maintenance or in the suppression of certain institutions or rules of the municipal law.

Permit me to state in the first place, that the discussion upon this matter was confused at its beginning by considerations not related to the principle of obligatory arbitration, and not even to arbitration in general, except in so far as arbitration, having its basis in the free consent of the States, must necessarily be established by a treaty. Not a single reason has been given us which, without referring to the whole field of conventional law, might prove an especial
[493] obstruction to having a convention between the sovereign States put obligatory arbitration into practice, without distinguishing between the cases of judicial, administrative or even legislative competence.

All that has been said along this line of thought to show the necessity of restricting obligatory arbitration to matters coming within the sphere of the

[1] Annex 37.

executive, is identically and integrally applicable, not merely to arbitration in general, obligatory or optional, but even to the whole field of conventional law. And if the correctness of this were admitted, it would establish as a superior principle, dominating the whole of the conventional law: that the juridical bond created by the convention between the sovereign States ceases in each State at the point where the authority of the judicial power begins. A State that shall no longer be held to accept or to execute an arbitral decision because it is in contradiction with the thing adjudicated or with the interpretation given by the national court must, so it seems to me, in order to be logical, be able to refuse to carry out all its contractual engagements so soon as its courts place obstacles in the way. Now, would not this be the same as saying that the judicial power, which after all is but one of the three essential functions of sovereignty, places itself above the sovereignty from which it emanates and of which it forms an integral part?

Let us be on our guard against these dangerous innovations which, under the pretext of superfluous guarantees against the supposed consequences of obligatory arbitration, would upset international law. Before subscribing to the cases for which it accepts obligatory arbitration, let each State thoroughly examine that which its interests and the tendencies of public opinion permit it to do: there is nothing more legitimate nor more natural. But after the Convention has been signed, it will be the business of each State to honor its signature in this matter, even as in the case of any other of its engagements. It is not the business of the contracting States, and they must even refrain from making it their business to know what authorities shall or may be invited in conformity with the constitutions and laws to take part therein. Provided that the obligations assumed be strictly carried out! This is all that we have a right to demand, and if complied with it will suffice. Whether the executive alone has participated in the execution or whether he was forced to call for the assistance of the legislative or of the judicial branch, it does not matter! Nor does it matter if even the laws and the constitution have not been strictly observed on that occasion! In abandoning this salutary principle, consecrated by practice and recognized by doctrine, there would result great uncertainty and danger: in the first place, it would become necessary to make a thorough study of the constitutions and of the laws in force in all the contracting States. Furthermore, would it not also become indispensable to secure guarantees against any constitutional or legislative change which might accidentally or even intentionally deprive the Convention of its practical value?

It still remains for me to reply to the remark that a State which has established the principle of the separation of its powers, in accepting obligatory arbitration for matters within the judicial competence, will find itself absolutely unable to carry out its engagements when confronted by a conflict between the arbitral decisions and the decrees of the national courts, and by the more than probable perspective of a public opinion favorable to the national courts. This is another consequence of the erroneous conception of the nature of international arbitration and that of an arbitral decision. We must, therefore, remind ourselves of the fact that arbitration is a complement of the convention to which it relates, and that the arbitral decision pronounces neither regarding the validity

nor the correctness of the decrees of the national courts, but solely and
[494] exclusively as regards the meaning and scope, the execution or the vio-

lation of their reciprocal engagements. The arbitral decision which condemns a State may obligate it either to repair wrongs or damages, or to take such measures as will provide that in future its engagements be carried out in conformity with the meaning and the scope which the arbitral decision assigns to them. The decisions rendered by the national courts are in no case and in no respect affected by the arbitral decision and, as regards the future, the national courts have to conform not to the arbitral decision but to the law, to the decree, to the regulation or to any other act by which the condemned State carries out the decision and conforms thereto. Let us repeat it: no direct relation exists or shall exist between arbitral decisions on the one hand, and the judgments of the national courts on the other. Arbitral decisions know only the States and consider only their acts which represent the sovereignties in their mutual relations. On the other hand, the national courts have to comply only with the sovereignty from which they emanate and, in consequence, they apply only the law of their country regardless of any international engagements, and without considering whether the national law has or has not faithfully interpreted these engagements.

In establishing our conventions regarding obligatory arbitration let us, therefore, pay no heed to the question of finding out what authority, executive, judicial or legislative, shall have to deal with them and to watch over their execution in the various contracting States. Any distinction we might attempt to make from this point of view, far from specifying any practical necessity whatever or from better guaranteeing the respect due to the sovereignty of the States, would, on the contrary, lead to uncertainties and equivocations which, in a given case, might prove a motive for intervention in the internal affairs of the contracting States.

His Excellency Sir **Edward Fry** desires that the committee should hold strictly to the program of the day.

The **President** brings up for discussion: "the program of the day concerning the propositions relative to obligatory arbitration." [1]

His Excellency Mr. **Asser** desires to remove a misunderstanding.

He agrees fully with the thesis of his Excellency Mr. MILOVAN MILOVANOVITCH as regards the obligations imposed by a treaty upon the State itself. In such case it would not be necessary to distinguish between the three powers On the contrary, if a State has merely obligated itself to insert certain conventional provisions in its legislation, this obligation will be carried out the moment when these provisions have been given legal force.

His Excellency Mr. ASSER declares that the subcommittee presided over by Mr. GUIDO FUSINATO had accepted his view-point as regards the distinction which he has just explained. (Point I.)

As to the second point, his Excellency Mr. ASSER agrees to the opportunistic point of view of the subcommittee which, when unions are treated of, confines the interpretative effect of the arbitral decision to the special case at hand.

His Excellency Mr. **Carlin** makes the following declaration:

With regard to "the program of the day" which we have before us, I wish to remark that it is evidently through error that the Swiss proposition appears at the end of this program of the day, under No. VIII. It comes even after the Austro-Hungarian "resolution." [2] If possible the Swiss delegation desires

[1] Annex to this minute.
[2] Annex 38.

to have included in the Convention itself at least the principle of obligatory arbitration. In this it finds a great advantage not met with in the Austro-
[495] Hungarian project. It believes, therefore, that its proposition [1] must be discussed before the Austro-Hungarian "resolution." [2]

The Swiss delegation believes, moreover, that its proposition must come up for discussion even before the new proposition of the United States of America and Article 16 *d* of the British proposition which were inspired by the idea and by the tendency of the Swiss proposition. I ask, therefore, that our proposition be not regarded as being of lesser importance than the Austro-Hungarian draft resolution, and I suggest that it be discussed before the new proposition of the United States of America and before Article 16 *d* of the British proposition.[3]

His Excellency Baron **Marschall von Bieberstein** declares that the interesting discussion between their Excellencies Messrs. ASSER and MILOVAN MILOVANOVITCH proves once more that it is absolutely impossible to foresee the consequences of obligatory arbitration. It is desired to give a uniform complement to a series of treaties relating to entirely different matters. He believes, therefore, that it will be necessary to submit the question to the Governments for a more thorough examination.

The **President** reads aloud *point I of the program of the day.* (Article 1, Section 1, of the proposition of the Fusinato subcommittee, adopted without remarks):

> The high contracting Parties agree not to avail themselves of the preceding article in the following cases.

It results from an exchange of views between the **President** and Mr. **Eyre Crowe** that the meaning of Article 1 of the proposition of the subcommittee and the meaning of Articles 16 *b* and 16 *c* of the British proposition are identical.

The **President** brings up for discussion *point II of the program of the day.* (Article 1, Section 2, of the proposition of the FUSINATO subcommittee [4]):

> Disputes concerning the interpretation or application of conventions concluded or to be concluded, and enumerated below, so far as they refer to agreements which should be directly executed by the Governments or by their administrative organs.

His Excellency Mr. **Milovan Milovanovitch** states that in connection with the Serbian proposition (Article 4)[5] he would personally be in favor of the retroactive effect of the Convention. He has phrased this article solely on the basis of the English suggestions. In consequence, he withdraws his proposition, reserving the privilege of making some remarks upon the British proposition.

His Excellency Mr. **Asser** states that the British proposition (Article 16 *e*)[6] and that of the subcommittee (Article 1, Section 2) do not exclude each other.

His Excellency Sir **Edward Fry** demands priority for the British proposition.

[1] Annex 27.
[2] Annex 38.
[3] Annexes 37 and 40.
[4] Annex to the minutes of this meeting.
[5] Annex 29.
[6] Annex 39.

His Excellency Mr. **Milovan Milovanovitch** states that the British formula is not satisfactory because it is too general. For the special case which shall
[496] have led to an arbitral decision, the latter will not merely have an interpretative value, and to wish now and then to restrict it to that meaning would be equivalent to taking all importance away from it and rendering it useless.

His Excellency Sir **Edward Fry** replies that his text expresses exactly the idea of the British delegation and that he never desires to give but an interpretative value to arbitral decisions.

The **President** puts the British proposition to a vote.

His Excellency Mr. **Ruy Barbosa** explains his abstention and reiterates his previous reservations of a general nature tending to guarantee plenitude of their competence to the national courts of his country.

His Excellency Baron **Marschall von Bieberstein** likewise states his reservations.

Voting for, 7: Great Britain, United States of America, Portugal, Norway, Sweden, Russia and France.

Voting against, 7: Germany, Brazil, Argentine Republic, Italy, the Netherlands, Mexico, Austria-Hungary.

Abstaining, 4.

The proposition is not adopted.

The text of the subcommittee (I § 2) is put to a vote.

Voting for, 9: The Netherlands, Germany, Brazil, United States of America, Italy, Greece, Mexico, Austria-Hungary, Russia.

Voting against, 3: Serbia, Norway, Sweden.

The **President** brings to discussion *point III of the program of the day.*

Article 2 of the proposition of the Fusinato subcommittee:

> If all the signatory States of one of the conventions enumerated herein are parties to a litigation concerning the interpretation of the convention, the arbitral award shall have the same force as the convention itself and shall be equally well observed.
>
> If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time and they have the right to intervene in the suit.
>
> The arbitral award, as soon as it is pronounced, shall be communicated by the litigant parties to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the judgment shall be valid only as regards the matter which formed the subject of the case between the litigant parties.
>
> It is well understood that the present Convention does not in any way affect the arbitration clauses already contained in existing treaties.

Paragraph 1 of the proposition of the subcommittee (Article 2) is adopted without remarks.

[497] The **President** sets forth the difference between the proposition of the subcommittee and the Serbian proposition (Article 3).[1]

His Excellency Mr. **Milovan Milovanovitch,** in order to explain the Serbian proposition, states that it has for its object to insure the uniform application of

[1] Annex 29.

world conventions. The interests of the States not parties to the disputes are sufficiently guaranteed by the systems of invitations foreseen by the proposition.

The Serbian proposition is not supported.

With regard to the proposition of the subcommittee (Article 2), his Excellency Mr. **Martens** would know in what manner the unanimity of the Powers to accept the interpretation of a matter in dispute is to be established. It would be necessary to add a clause obligating them to declare their opinions with regard to the decision rendered.

His Excellency Mr. **Milovan Milovanovitch** concurs in this view.

His Excellency Mr. **Hammarskjöld** states that he is opposed to the two propositions: that of the Serbian delegation and that of the subcommittee.

The **President** puts to a vote paragraphs 2 and 3 of the proposition of the subcommittee (Article 2).

Voting for, 12: The Netherlands, Germany, Great Britain, Argentine Republic, Italy, Greece, Mexico, Portugal, Switzerland, Austria-Hungary, Russia, France.

Paragraph 4 is adopted without voting upon it.

The whole of the proposition of the subcommittee (Article 2) is adopted by 12 votes against 3.

Voting for: The Netherlands, Great Britain, Brazil, Argentine Republic, Italy, Mexico, Portugal, Norway, Austria-Hungary, Sweden, Russia, France.

Voting against: Germany, Greece and Belgium.

Abstaining: The United States of America.

The **President** observes that the acceptance of Article I, Section 1 of the proposition of the subcommittee (the equivalent of Article 16 *b* of the British proposition) implies acceptance of the list (provisional, of course) of the British proposition as it was adopted at one of the last meetings.

The **President** brings to discussion *point IV of the program of the day* (British proposition, Article 16 *d*)[1].

[498] The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

1. Other subjects which seem to them at present capable of submission to arbitration without reserve.

2. The Powers which, from now on, contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

His Excellency Mr. **Ruy Barbosa** states that, in his judgment, those who have previously voted against one of the cases already put to a vote, by voting now upon the whole of the list, mean in no way to accept the cases which they have refused.

Mr. **Eyre Crowe** explains that Article 16 *c* of the British proposition presupposes for its adoption the unanimity of the Powers. For want of this unanimity the article would fall away, and in such case we would have before us only the protocol referred to in Article 16 *d*.

The **President** states that the vote which has been had upon the British list is not of a definitive character. Therefore the question as to whether Article 16 *c* will fall away cannot at present be prejudged. Only after it shall have been defini-

[1] Annex 39.

tively established that no unanimity exists for any point of the list, Article 16 *d* would alone become applicable.

The PRESIDENT puts to a vote the principle itself of the model table of the British proposition.[1]

Voting for, 10: Brazil, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Portugal, Norway and France.

Voting against, 5: The Netherlands, Germany, Austria-Hungary, Russia, Switzerland.

Abstaining, 3.

The committee passes on to the discussion of the articles of the British protocol referred to in Article 16 *d* of its proposition relative to obligatory arbitration.[2]

The **President** reads aloud Article 1.

ARTICLE 1

Each Power signatory to the present protocol accepts arbitration without reserve in such of the cases listed in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it makes this engagement with each of the other signatory Powers whose reciprocity in this respect is indicated in the same manner in the table.

His Excellency Mr. **Nelidow** calls the attention of the committee to the difference in the phraseology between this article and Article 1, Section 2, of the proposition of the subcommittee which has just been adopted.

Whilst the latter text refers to controversies concerning the interpretation and the application of conventions, the first point of the protocol accepts arbitration for "matters enumerated in the table."

His Excellency Mr. NELIDOW declares his inability to accept this latter phraseology.

[499] Mr. **Eyre Crowe** replies that this is but a simple error that will be rectified.

Mr. **Guido Fusinato** states these terms "obligate themselves not to avail themselves of," in Article 1, Section 1, of the proposition of the subcommittee, have the same bearing and relate to the same idea as the words "without reservation" of the British proposition.

It will be necessary, later on, to harmonize these two texts as to their phraseology.

The committee adopts Article 1, save its phraseology.

Article 2 then is taken up.

ARTICLE 2

Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table with respect to which it may not already have accepted arbitration without reserve. For this purpose it shall address itself to the Netherland Government, which shall have this acceptance indicated on the table and shall immediately forward true copies of the table as thus completed to all the signatory Powers.

Mr. **Lange** suggests that the work referred to in this article be entrusted to the Hague International Bureau.

[1] Annex 41.
[2] Annex 40.

Such a mission would result in developing the institution and giving to it, as was done with regard to the bureaus of the Berne Universal Unions, the character of an administrative world institution. It would thus be the central bureau for international arbitration.

His Excellency Mr. **Carlin** observes that in making their communications the Powers do not address themselves directly to the Berne Bureaus, but to the Federal Council whose activities in this matter are confined to informing the Bureaus and to transmitting to them, if necessary, copies of the acts or of the declarations.

His Excellency Mr. CARLIN suggests that in this case an analogous proceeding be resorted to.

His Excellency Mr. **Martens** believes that the International Bureau does not exercise any diplomatic rôle, but it might be stipulated here that the Netherland Government shall communicate to it all declarations that may reach it.

His Excellency Mr. **Hammarskjöld** is of opinion that a State may be bound only by a formal declaration of its Government and not by an entry in a table. This table may be useful and make it easy to get a clear idea of the situation as to obligations at a given moment, but not to establish a legal bond.

Mr. **Lange** asks, furthermore, that the International Bureau be made the custodian of the archives.

His Excellency Mr. **Carlin** states that with regard to the Berne Unions, the notifications made to the Federal Council are kept in the archives of the Confederation and that the Bureau is kept informed by the Federal Council of all that is going on.

The **President** believes that declarations of adhesion must be addressed to the Government of the Netherlands.

[500] He proposes that the committee invite some of its members to submit to it a new phraseology, in conformity with the views just expressed.

Mr. EYRE CROWE, his Excellency Mr. CARLIN, his Excellency Mr. MARTENS and Mr. LANGE are appointed for that purpose.

His Excellency Count **Tornielli** calls for entry into the model table of the contents of the lists of all the propositions deposited.

Mr. **Eyre Crowe** replies by saying that this will be done.

Articles 3 and 4 are passed without remarks.

ARTICLE 3

Moreover, two or more signatory Powers, acting in concert, may address themselves to the Netherland Government and request it to insert in the table additional subjects with respect to which they are ready to accept arbitration without reserve. These additional matters shall be entered upon the table, and a certified copy of the text as thus corrected shall be communicated at once to all the signatory Powers.

ARTICLE 4

Non-signatory Powers are permitted to adhere to the present protocol by notifying the Netherland Government of the matters in the table with respect to which they are ready to accept arbitration without reserve.

The **President** puts to a vote the whole of the British protocol.[1]

Voting for: Brazil, Great Britain, United States of America, Argentine Republic, Italy, Serbia, Mexico, Portugal, Norway, France and Sweden.

[1] Annex 40.

Voting against: Germany, Switzerland, Austria-Hungary and Belgium.

Abstaining: The Netherlands and Russia.

His Excellency Mr. **Asser** states that he had no instructions from his Government.

Point V of the program of the day is then taken up; it enables the authors of the Serbian and Swedish propositions [1] to call for another vote upon items not yet put to a vote.

His Excellency Mr. **Hammarskjöld** states that he does not request a supplementary vote at the present time, but that he reserves to himself the right to avail himself of such a vote later on.

His Excellency Mr. **Milovan Milovanovitch**, on the contrary, believes that it would be advantageous to bring to a vote a new item including the [501] postal conventions (for which obligatory arbitration has already been provided) and telegraphic and telephonic conventions.

This proposition is put to a vote.

Voting for, 8: the Netherlands, United States of America, Italy, Serbia, Mexico, Portugal, Norway, France.

Voting against, 3: Germany, Austria-Hungary, Belgium.

Abstaining, 7.

Upon an observation of his Excellency Mr. MILOVAN MILOVANOVITCH, the **President** finds that all questions relative to contract debts and to public debts will be discussed later on, along with the proposition of General PORTER.

It is difficult at this time to decide whether or not these two categories are referred to in this proposition, without at the same time launching into a general discussion.

The program of the day calls for the discussion of Article 4 of the proposition of the United States of America.

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

Mr. **James Brown Scott** believes that the matter of the *compromis* should, logically, be left for a later discussion, but states that he is ready to listen to the remarks that might be offered with regard to Article 4 of the American proposition, reserving to himself the right to reply only at the beginning of the next meeting.

His Excellency Mr. **Milovan Milovanovitch** states that the Serbian delegation has also deposited a proposition concerning the *compromis*. He feels, therefore, obliged to state that, in his opinion, this should in no way lessen the juridical bond between the signatories of the Convention, in view of the fact that the constitutional or legislative formalities required for the fulfilment of international engagements neither must, nor can in any way invalidate or weaken such engagements. The article in question must, therefore, be solely interpreted in this sense: that each State shall have the right on the occasion of each arbitration case to follow the procedure that its constitution and its laws impose upon it for the establishment of the *compromis*.

[1] Annexes 29 and 22.

His Excellency Baron **Marschall von Bieberstein** requests that Mr. JAMES BROWN SCOTT explain the bearing of Article 4. He believes, that he understands that, in case he were bound by a treaty concerning obligatory arbitration, the *compromis* must be signed and not refused by his cosignatories. We are not here merely dealing with the intervention of the Senate, but with that of the internal legislation.

Mr. **James Brown Scott** admits that this concerns matters of public internal law; the obligation on the part of the State to sign the *compromis* exists nevertheless; it cannot escape this obligation.

[502] Mr. SCOTT declares that he will give a fuller explanation at the next meeting.

Before passing on to the following point of the program of the day, the **President** grants the floor to his Excellency Mr. CARLIN to explain his request for priority in favor of his proposition with regard to the Austro-Hungarian draft resolution.

His Excellency Mr. **Carlin** believes that his proposition should be brought up for discussion before that of Austria-Hungary because it is an amendment to Article 16 of the Convention of 1899, while the proposition of Mr. MÉREY is a simple resolution that will find no place in the Convention itself. Nevertheless, his Excellency Mr. CARLIN is not opposed to having brought to discussion the amendment of the Austro-Hungarian delegation which he accepted in his Article 16.

His Excellency Mr. **Mérey von Kapos-Mére** supports the motion just made not simply for the reasons stated by his Excellency Mr. CARLIN, but also because it has chronological priority in its favor.

His Excellency Mr. **Alberto d'Oliveira** thinks that a vote upon the proposition of the Swiss delegation, as upon any other subsidiary proposition, would have no significance because the committee has voted the British proposition.

His Excellency Mr. **Carlin** refers to the fact that the Swiss proposition has been presented in order to aid the committee to extricate itself from a deadlock into which it seemed to become involved and in order to permit both the partisans and the opponents of a world obligatory arbitration treaty to adhere to a proposition that would be accepted by all. In this sense, and as a conciliatory proposition, it seems to be useful even now, since neither unanimity nor quasi-unanimity has been secured for the British proposition.

His Excellency Mr. **Alberto d'Oliveira** pays homage to the Swiss suggestion, but he thinks that it can no longer be of use to those who have just accepted the British proposition.

His Excellency Mr. **Carlin** is of opinion that the manner of procedure indicated by his Excellency Mr. ALBERTO D'OLIVEIRA is a dangerous one because no case of the Portuguese list has secured unanimity of votes.

His Excellency Mr. **Alberto d'Oliveira** replies that all the hypotheses, even the hypothesis of non-unanimity, have been provided for in the British proposition in which the Portuguese delegation has concurred. It is certain that the principle of the Swiss proposition itself has been adopted under the form of the protocol annexed to Article 16 *d*. All the propositions that have been presented have influenced one another; this cannot be denied. And, after all, is not the Portuguese proposition the common source of all these influences?

The **President** believes that, without prejudging the future, it will be diffi-

cult for the committee to adopt two propositions which are in some respects contradictory, and that those who have accepted the British proposition will vote against the Swiss project in order not to surrender their point of view.

His Excellency Baron **Marschall von Bieberstein** thinks, on the contrary, that in a committee of examination it is possible to adopt even contradictory propositions, especially in case unanimity has not been secured. And [503] it may be interesting to find out whether or not a certain proposition might obtain unanimity.

His Excellency Mr. **Carlin,** in his turn, believes that all those who have accepted the British proposition may also vote upon his proposition, with the express reservation that their votes do not annul their previous decision in favor of a more general and more obligatory formula.

Mr. **Lange,** while desirous of expressing his commendation of the Swiss proposition which, in his judgment, has in a happy manner formulated an eminently useful idea, and which, moreover, inspired both the new proposition of the United States of America and the British proposition of an additional protocol, feels compelled to vote against the Swiss proposition, because it would now form a duplicate of the British protocol the principle of which has just been adopted. This does not mean that the Swiss proposition may not later be accessorily presented.

His Excellency Mr. **Mérey von Kapos-Mére** draws a distinction; it seems to him incontrovertible that as far as discussion is concerned no proposition should be disregarded, and that it is even necessary to examine those of a contradictory nature. As to the voting itself, it must be remembered that all votes are provisional and that it is not at all impossible to vote in favor of two different propositions, first in order to give a large majority to one and then vote for the other which one might eventually feel inclined to accept.

His Excellency Mr. **Alberto d'Oliveira** again states that in his judgment the British proposition has already given satisfaction to the wishes of the Swiss delegation. He calls the attention of the committee to the fact that even the Powers that might not at present obligate themselves to submit certain definite matters to arbitration may, nevertheless, accept the British proposition in its present form. For Article 16 *c* will be retained only if it secures a unanimous vote, as was expressly stated by Mr. Crowe, and the article following (Article 16 *d*) will then be substituted for it. But this article proposes to annex to the Convention a protocol which shall enumerate, on the one hand, those matters seeming at present susceptible of being submitted to arbitration (which is exactly the essence and even the form of the Swiss proposition), and on the other hand, the Powers that even now obligate themselves for all or for a part of these matters. It is evident, therefore, that everybody may sign the Convention, even though but few Powers should sign the second part of the protocol. The English formula thus has the advantage of making it possible to secure a unanimous vote for the principle of obligatory arbitration and yet taking into account the objections which some Powers have raised as regards the application of this principle in virtue of an immediate engagement.

An exchange of views takes place upon this matter between Mr. **Lammasch,** their Excellencies Messrs. **Martens, Carlin, Nelidow, Asser, Alberto d'Oliveira** and the **President.**

The **President**: The Swiss proposition creates a counsel empowered to consider definite cases after the Conference. Those who may deem it expedient to do so will act accordingly, and the rest need not do so. Those who have already voted in favor of the real obligation may not now cast a vote permitting them to exercise that option. We cannot, at the same time, vote for and against.

[504] Upon the proposition of their Excellencies Messrs. **Nelidow** and **Martens**, the **President** states that a table will be prepared showing all the provisions already adopted. He then advises with the committee with regard to giving immediate consideration to the Swiss proposition.

The committee having decided in favor of an immediate vote (11 against 5), the Swiss proposition is put to a vote.

His Excellency Count **Tornielli** desires to have it understood that those voting against the Swiss proposition, will not deprive it of its accessory and compromise character.

The proposition is rejected by 10 votes.

Voting for: Germany, Argentine Republic, Belgium, Greece and Switzerland.

Voting against: Brazil, Great Britain, United States of America, Italy, Serbia, Mexico, Portugal, Norway, Russia and France.

The meeting closes at 6 o'clock.

Annex

PROGRAM OF THE DAY

CONCERNING THE PROPOSITIONS RELATIVE TO OBLIGATORY ARBITRATION

[506]

I.

Proposition of the subcommittee presided over by Mr. Fusinato [1]	*British Proposition* [2]
ARTICLE 1, SECTION 1	ARTICLE 16 *b*
The high contracting Parties agree not to avail themselves of the preceding article in the following cases:	The high contracting Powers recognize that in certain disputes provided for in Article 16 there are reasons for renouncing the right to avail themselves of the reservations therein set forth.

II.

Proposition of the subcommittee presided over by Mr. Fusinato	*British Proposition*
ARTICLE 1, SECTION 2	ARTICLE 16 *e*
Disputes concerning the interpretation or application of conventions concluded or to be concluded, and enumerated below, so far as they refer to agreements which should be directly executed by the Governments or by their administrative departments.	It is understood that arbitral awards shall never have more than an interpretative force, with no restrictive effect upon prior judicial decisions.

III.

Proposition of the subcommittee presided over by Mr. Fusinato

ARTICLE 2

If all the signatory States of one of the conventions enumerated herein are parties to a litigation concerning the interpretation of the convention, the arbitral award shall have the same force as the convention itself and shall be equally well observed.

If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time and they have the right to intervene in the suit.

[508] The arbitral award, as soon as it is pronounced, shall be communicated by the litigant parties to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the judgment shall be valid only as regards the matter which formed the subject of the case between the litigant parties.

It is well understood that the present Convention does not in any way affect the arbitration clauses already contained in existing treaties.

[1] Annex 30.

[2] Annex 39.

[507]

Proposition of the United States of America [1]

ARTICLE 3, SECTION 1

Each of the signatory Powers agrees not to avail itself of the provisions of the preceding article in such of the following cases as shall be enumerated in its ratification of this Convention, and which shall also be enumerated in the ratifications of every other Power with which differences may arise; and each of the signatory Powers may extend this agreement to any or all cases named in its ratification to all other signatory Powers or may limit it to those which it may specify in its ratification.

British Proposition [2]

ARTICLE 16 *c*

With this in mind they agree to submit to arbitration without reservation disputes concerning the interpretation and application of treaty provisions relating to the following subjects.

Serbian Proposition [3]

ARTICLE 4

The present Convention has no retroactive power and applies, in so far as it concerns the interpretation and the application of treaties, only to those treaties concluded or renewed after its going into effect and, in so far as it concerns the disputes provided for under Nos. 2, 3, 4 and 5 of Article 1, only to those cases arising since its going into effect.

Serbian Proposition

ARTICLE 3

When there is a question of the interpretation or application of a general convention, the procedure shall be as follows, so far as it is not determined by the aforesaid Conventions themselves, or by special agreements which may be attached thereto.

The litigant parties shall notify all the contracting Powers of the *compromis* which they have signed, and the contracting Powers have a period of . . . , counting from the day of the notification, to declare whether and in what way they will take part in the
[509] litigation. The arbitral award is binding upon all the States taking part in the litigation, both in their mutual relations and in their relations to other contracting Powers.

The States which have not taken part in the litigation may demand a new arbitration upon the same question, whether it concerns disputes which have arisen between them, or whether they do not agree to accept the award rendered with regard to States taking part in the first litigation.

If the second arbitral award is the same as the first, the question is finally settled and this decision, thus having become an integral part of the Convention, shall be binding upon all of the contracting parties. If, on the contrary, the second decision differs from the first, a third arbitration may be demanded by any contracting State and the third award shall then be generally binding.

[1] Annex 37. [2] Annex 39. [3] Annex 29.

IV.

British Proposition

ARTICLE 16 *d*

The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

1. Other subjects which seem to them at present capable of submission to arbitration without reserve.

2. The Powers which, from now on, contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

V.

Paragraphs of the Serbian and Swedish propositions

VI.

Proposition of the United States of America

ARTICLE 4

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

VII.

[510] *Austro-Hungarian Proposition* [1]

The following paragraph to be added to Article 16 of the Convention of July 29, 1899:

Consequently, it would be desirable that in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.

VIII.

Swiss Proposition [2]

ARTICLE 16

Adopt the addition of paragraph 2 as proposed by the delegation from Austria-Hungary.[1]

ARTICLE 16 *a*

Independently of the general or special treaties which now provide or shall provide in the future for obligatory arbitration between the contracting States the signatory Powers

[1] Minutes of the sixth meeting of committee A. [2] Annex 28.

upon which the authors request another vote [1]

Serbian Proposition

ARTICLE 2

In each particular case submitted to arbitration after this Convention, a special *compromis* shall be drawn up by the parties in dispute, conformably to their respective constitutions and laws, defining clearly the subject of the dispute, the constitution of the arbitral tribunal, the extent of its powers, and the procedure to be followed.

[511]

Austro-Hungarian Proposition [2]

RESOLUTION

After having conscientiously weighed the question of arbitration, the Conference has finally come to the conclusion that certain matters, carefully specified, are susceptible of submission to obligatory arbitration without any restriction, and that those which lend themselves particularly to this method of settlement are disputes regarding the interpretation or application of certain international conventions—or parts of conventions—appearing among those which are contained in the proposition of the Portuguese delegation.

Most of the matters in question being more or less technical in character, any decision as to the extent to which and the conditions under which obligatory recourse to arbitration might here be introduced should, however, be preceded by such study as is beyond the competence of the Conference and can be entrusted only to experts, inasmuch as it requires special knowledge and experience. The Conference, therefore, invites the Governments after the close of the Hague meeting to submit the question of obligatory arbitration to a serious examination and profound study. This study must be completed by the ———, at which time the Powers represented at the Second Hague Conference shall notify each other through the Royal Netherland Government of the matters which they are willing to include in a stipulation regarding obligatory arbitration.

Greek Amendment [3]

Add to Article 16 *a* a third paragraph reading as follows:

Every restriction or reservation which any one of the signatory Powers may add to the notification foreseen in paragraph 1 with respect to matters regarding which it declares itself willing to accept arbitration, may be invoked against that Power by any other Power, even if the latter has not made any reservation or restriction with respect to the said matters in its notification.

[1] Annexes 29 and 22. [2] Annex 38. [3] Annex 36.

to the present Convention which, under reciprocal conditions, would be willing to accept obligatory arbitration for all or any one of the matters enumerated below, shall make known their decision through the Netherland Government to the other signatory Powers to the present Convention.

1. Commerce and navigation.
2. International protection of workmen.
3. Posts, telegraphs, and telephones.
4. Protection of submarine cables.
5. Railroads.
6. Means of preventing collisions at sea.
7. Protection of literary and artistic works.
8. Industrial property.

[512]

9. Regulation of industrial and commercial companies.
10. Money, weights and measures.
11. Reciprocal free aid to the indigent sick.
12. Epidemics, epizooty, etc.
13. Private international law.
14. Civil and criminal procedure.
15. Extradition.
16. Diplomatic and consular privileges.

Etc., etc.

Obligatory arbitration shall be established for one signatory Power with regard to another as soon and so far as these Powers shall have given notice of their adoption of the same matters appearing in the above list.

ARTICLE 16 *b*

Arbitration treaties and arbitration clauses in treaties already concluded or to be concluded shall be reserved.

[514]

FOURTEENTH MEETING

AUGUST 31, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the twelfth meeting, August 26, are adopted.

The **President** has distributed among the members of the subcommittee the "Texts adopted by Committee A and the votes cast in the meetings of August 23 and 29." [1]

Mr. **Guido Fusinato** proposes the addition of three new paragraphs to Article 2 of the proposition of the subcommittee, over which he presides.

> The procedure to be followed in order to bring about adhesion to the principle established by the arbitral decision, in the case referred to in paragraph . . . shall be as follows:
>
> If a convention establishing a union with a special bureau is involved, the parties that have taken part in the suit shall transmit the text of the decision to the special bureau through the medium of the State within whose territory the bureau has its headquarters. The bureau shall draft the text of the article of the convention conformably to the arbitral decision and communicate it through the same medium to the signatory Powers that have not taken part in the suit. If the latter unanimously accept the text of the article, the bureau shall establish the assent by means of a protocol which, drafted in due form, shall be transmitted to all the signatory States.
>
> If a convention establishing a union with a special bureau is not involved, the functions of the special bureau shall be exercised by the Hague International Bureau through the medium of the Government of the Netherlands.

Mr. **Heinrich Lammasch** calls attention to the fact that the proposed phraseology does not solve the difficulty that will arise in case any Power should fail to reply to the communication of the bureau. It would be necessary to introduce a provision permitting to presume the assent of the Power that might not have made answer within a certain period of time.

His Excellency Mr. **Martens** concurs in the opinion expressed by Mr. HEINRICH LAMMASCH.

[515] Mr. **Guido Fusinato** accepts the proposition of Mr. HEINRICH LAMMASCH, and believes that the delay should be rather extended by reason of the great distances between certain States.

His Excellency Mr. **Carlin** proposes to fix this delay at *one year*. He suggests, moreover, the addition of the words *"in this respect"* after the words *"the functions of the special Bureau,"* proposed by Mr. FUSINATO.

[1] Annex A to these minutes.

With regard to paragraph 4 of Article 2 of the proposition of the subcommittee,[1] Mr. **Eyre Crowe** recalls the fact that Article 16 *b* of the British proposition which offers an identic solution to the question that has been brought up, has already been adopted and that it is sufficiently extended to include the case referred to in the said paragraph 4.

Mr. **Heinrich Lammasch** observes that Article 16 *b* refers to the *conditions* of an arbitration, whilst paragraph 4 of the proposition of Mr. FUSINATO deals with the effects or the consequences of the arbitral decision.

Mr. **Georgios Streit** proposes to use in paragraph 4 the words "*provisions of the present article*" instead of "*the present Convention.*"

Mr. **Guido Fusinato** would prefer the words "*the present provision.*"

His Excellency Sir **Edward Fry** proposes to expunge from the last clause of the third paragraph of the Fusinato text the words "*the matter which formed the subject of the case.*" For the sake of the principle of the thing adjudicated, his Excellency Sir EDWARD FRY desires that the decision should always have value for the parties to the dispute.

Mr. **Guido Fusinato** calls attention to the fact that if the proposition of his Excellency Sir EDWARD FRY is adopted, the interpretation of a convention given by an arbitral decision would bind the parties not only for the special case, but likewise for the future. And as a result of this state of affairs, we would end by creating, besides the general bond between all the parties of a convention, several special bonds corresponding to the different arbitral awards rendered between certain Powers, the effect of which would be confined to them alone.

His Excellency Mr. **Milovan Milovanovitch** shares the opinion expressed by his Excellency Sir EDWARD FRY. If we declare that the arbitral decision is without interpretative effect, we denature it and in most cases take all value from it.

His Excellency Mr. **Martens** also concurs in the opinion expressed by his Excellency Sir EDWARD FRY. It seems to him that in concluding their *compromis,* the parties in dispute have principally in mind the settlement of the question for the future.

Mr. **Guido Fusinato** states that he is no longer opposed to the proposition of his Excellency Sir EDWARD FRY. He has merely desired to point out some of its consequences.

His Excellency Mr. **Mérey von Kapos-Mére,** on the contrary, is opposed to the British proposition which would naturally lead to a series of diverging interpretations of a general convention. He proposes to expunge the entire closing clause of paragraph 3: "*In the contrary case . . . litigant Parties.*" Thus we should not prejudge the solution of the question.

His Excellency Mr. **Milovan Milovanovitch** states that in this way the text would present a gap. We must foresee all that which may happen in the contrary case.

[516] His Excellency Mr. **Martens** remarks that to put them in the presence of an authentic interpretation of a convention will be rendering great service to the Powers that have not taken part in a dispute: they may profit by the light furnished by the decision.

His Excellency Mr. Milovan **Milovanovitch** calls the attention of the committee to the fact that the difficulty which has been pointed to, but a few minutes

[1] Annex to the minutes of the thirteenth meeting.

ago, by Mr. FUSINATO and by Mr. MÉREY, persists, even if the former phraseology is left intact or if we expunge the entire clause as proposed by Mr. MÉREY.

The uniform application of a convention of this nature cannot result from the limitation of the value of the arbitral decision to the special case which has been the object of the dispute, for the very fact that arbitration has been necessary proves that stipulations are involved that have been interpreted and applied differently by the various contracting States. To deprive the arbitral decision of any interpretative effect would, therefore, merely mean to do away with the only means by which it would have been possible to secure the uniform application of the Convention.

His Excellency Mr. **Mérey von Kapos-Mére** does not deny the correctness of this observation. He desires, however, to know what would be the situation of the national courts in the presence of decisions of an international tribunal, decisions that would be obligatory in the future.

Mr. **Guido Fusinato** replies that these are not matters coming within the competence of the courts. If the proposition of his Excellency Sir EDWARD FRY is accepted, it will still be necessary to state whether the arbitral decision will be valid only " between " the parties in dispute or likewise " for " them in their relations with the other signatories of a convention.

Mr. **Louis Renault** believes that in such case, the decision should be obligatory, in a general way, *for* the parties in dispute.

The **President** reserves the details of phraseology and puts to a vote the proposition of his Excellency Sir EDWARD FRY for leaving out the words *" the matter which formed the subject of the case."*

Voting for, 12: Serbia, Great Britain, Italy, United States of America, Greece, Norway, Brazil, Mexico, Portugal, Sweden, Russia and France.

Voting against, 4: Germany, Austria-Hungary, Switzerland, Argentine Republic.

Abstaining, 2.

The proposition of his Excellency Sir EDWARD FRY is, therefore, adopted.

Mr. **Eyre Crowe** states in connection with Section 1 of Article 1 of the proposition of the subcommittee presided over by Mr. GUIDO FUSINATO [1] that, in the interest of a more correct text, he would prefer to see its place taken by Article 16 *b* of the British proposition.[2]

Mr. **Guido Fusinato** would, in that case, prefer the adoption of the Portuguese formula (16 *b*)[3] which excludes even the supposition that in controversies regarding the enumerated cases, the honor or the vital interests might be involved.

Mr. **Eyre Crowe** states that the words *" in the following cases,"* of Article 1 of the subcommittee constitute Article 16 *c* in the British proposition.

[517] The **President** requests Messrs. EYRE CROWE and GUIDO FUSINATO to come to an understanding between themselves concerning the text.

His Excellency Mr. **Milovan Milovanovitch** takes up again Article 16 *e* of the British proposition which was defeated at the last meeting by a vote of 7 against 7. His Excellency Mr. MILOVAN MILOVANOVITCH had abstained, at the

[1] Annex to the minutes of the thirteenth meeting.
[2] See note 3 to p. 540 [note 1 to p. 534].
[3] Annex 34.

time, from voting because the text did not seem to him very clear. He has since come to an understanding with his English colleagues, and in agreement with them he proposes the following text:

> It is understood that arbitral awards, so far as they relate to questions entering within the competence of national justice, shall only have an interpretative force, with no retroactive effect upon prior judicial decisions.

The **President** declares that the question will be examined again at the time of the second reading and he has special record made of the proposition of his Excellency Mr. MILOVAN MILOVANOVITCH.

His Excellency Mr. **Carlin** makes the following declaration:

I had requested the privilege of speaking ever since the beginning of the meeting because the few words that I am about to say relate to our meeting of day before yesterday.

I do not like to have a doubt remain or a misunderstanding arise as to the meaning and the scope of the Swiss proposition which, at the request of the British delegation, was submitted to your vote at the last meeting.

As I have already stated on July 27, at the meeting of the first subcommittee of the First Commission, Switzerland has never ceased taking a lively interest in the efforts tending to extend the institution of arbitration. Our proposition can, therefore, have been inspired only by that disposition. It had and has no other object than that of suggesting a formula permitting the inclusion of the principle of obligatory arbitration in the Convention, and of constituting it on a practical basis susceptible of extension and acceptable to all the States.

I am happy to realize that this tendency has been recognized and appreciated. For the idea of the Swiss proposition has found support in the new propositions from the delegations from Great Britain and of the United States of America. Especially Article 16 *d* of the British proposition which you adopted day before yesterday, only develops in certain details and by means of the "protocol" therein foreseen, the fundamental thought expressed in the Swiss proposition. This last point not having been sufficiently set into relief in our last meeting, I have desired to call your attention to it, in order that no one might be mistaken as regards our attitude towards *that part* of the British proposition.

The **President** has special record made of the declaration of his Excellency Mr. CARLIN.

The committee passes on to the discussion of *point VI of the program of the day* (Article 4 of the proposition of the United States of America relative to obligatory arbitration).[1]

Mr. **James Brown Scott** speaks as follows:

The Convention of 1899 for the pacific settlement of international disputes prescribes in Article 31 the following method for framing the *compromis,* that is to say, the question at issue:

> The Powers which have recourse to arbitration sign a special act (*compromis*), in which are clearly defined the subject of the dispute and the extent of the arbitrators'
[518] powers. This act implies an engagement of the parties to submit in good faith to the arbitral award.

[1] Annex to the minutes of the thirteenth meeting.

Article 4 of the American project lays down the principle that the *compromis* required by Article 31 shall be framed in accordance with the laws and constitutions of the signatory Powers:

> In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

In considering the *compromis* we must be careful not to exaggerate its importance and make it the matter of supreme moment, to the detriment or exclusion of the treaty, for the *compromis* depends upon the treaty and has no independent existence. If there is no treaty, there can be no *compromis*. If we consider the nature of the treaty as an international act, we shall be better able to appreciate the nature and importance of the *compromis*.

A treaty is an agreement between two or more nations both willing and able to agree. A contract is the solemn expression in legal form of the realized intention of the parties. If concluded between individuals, it is a contract of private law; if concluded between States, it is a public contract to which we give the name of treaty. The act of the parties expressed in terms of law carries with it the obligation to do or not to do a particular act, and pledges their good faith to the performance of the act in all its parts. There are two kinds of treaties. The first creates a status complete in itself without further action on the part of the contracting parties. There is, however, a second class which creates mutual rights and duties and binds each party to the strict observance of its terms. It is only necessary to cite the instance of the treaty providing for the payment of a sum of money. Such a treaty obligates the contracting party to raise the sum required in accordance with the rules of its internal organization, and to pay the debt in order to extinguish its obligation. It is the treaty that creates the international obligation, but its execution depends upon the cooperation of a branch or department of the internal administration. Whether this internal organ be composed of one or many persons is a matter of indifference to international law, for international law has nothing to do with the domestic machinery by which or through which the international duty is performed.

But to return to the *compromis*. We shall suppose that the contracting parties foresee that the interpretation of the treaty and consequently its execution may give rise to a divergence of views, perhaps to serious disagreement. They therefore agree in advance to adjust their differences peaceably and provide by arbitration an impartial and final settlement. But in order to submit the controversy to arbitration it is necessary that the parties agree upon the issue or the question to be submitted. This is the substance and essence of the *compromis* as prescribed by Article 31 of the Convention for the pacific settlement of international disputes, and by Article 4 of the American project.

The formulation of the issue is the result of negotiation and is only reached when the parties in conflict are agreed upon the points in controversy. If the claims of state A are unreasonable, it cannot be expected that state B will accept them, nor can we hope for an agreement if the counterclaims of state B are unacceptable. It is only when negotiation has succeeded in eliminating all questions foreign to the controversy, and in ascertaining the exact question in
[519] dispute, that we have the basis of a settlement, and it is only when the formulation of the object and the exact determination of the issue are

accepted by both parties that an agreement exists. To become binding it is necessary that the projected agreement be ratified in each of the States by the department or body charged with the conduct of foreign affairs. This may be a single individual, the responsible head of a State, or the chief executive acting in cooperation with an internal body or branch of the Government. For example, in the United States this power is lodged with the President by and with the advice and consent of the Senate. In any case the proposed accord is not binding until ratified by the competent power, and this competent power or branch of the Government is determined by the constitutions and the laws of the contracting parties. It is no doubt true that a single body or person will act more rapidly than a numerous body or complex organ, but it is not the domestic organ; it is the accord which interests us, for the organ, as previously stated, is indifferent to the eyes of international law. The moment that an obligation exists the channel through which it is executed has only an academic interest.

In order that this point may be clearly grasped (says Mr. SCOTT), and that there may be no misunderstanding as to the delay which might be necessary for bringing about the collaboration of the national organ, the United States has endeavored to express in clear and explicit terms the fact that the elaboration of the *compromis* depends upon the authority which is competent to conclude treaties. In America, for instance, it is the Executive and the Senate.

It may not always be necessary to submit the *compromis* to the Senate, and in practice this is not ordinarily done. The recent agreement to arbitrate the controversy arising out of the question of the Pious Funds and the *compromis* submitting the Venezuelan difficulties to arbitration were not submitted to the Senate. But we desire to reserve the right to submit the *compromis* to the Senate and we notify the contracting Powers of the reservation.

The refusal to accept an unreasonable *compromis* is not and cannot be a violation of a treaty. On the contrary, it is unreasonable to suppose that an unreasonable claim or pretension will be accepted as presented. The rejection of an unreasonable claim or pretension is not a breach of the contract, for the parties only bound themselves to accept a reasonable claim or pretension arising out of and connected with the contract. The refusal to accept merely means that the claim is unacceptable because it is unreasonable, and it is only when the claims and counterclaims are acceptable to the contracting parties that we can expect a *compromis* to be ratified. It is not to be supposed that a Government will reject an acceptable proposition. No single case of this kind has arisen in our history, and the question is and must remain purely academic. It is doubtless true that a treaty creates an obligation, a *juris vinculum,* but the refusal to agree to a *compromis* containing an unreasonable demand is no breach of a treaty imposing the acceptance of a reasonable contention. It is simply the rejection of an unacceptable *compromis,* not the breach of the treaty creating the duty to negotiate a *compromis.* The *compromis* is the result of the negotiation between two States upon the footing of absolute legal equality, from which it follows necessarily that each State is the sole judge whether the proposed *compromis* is or is not acceptable.

To sum up, if it is intended that the right to submit the elaboration of the *compromis* to national constitutional and legislative provisions must be reserved, *expressis verbis,* we fully admit the legality of this requirement. As far as we are concerned, the reservation goes without saying, imposes itself automatically;

but, in order to avoid possible misunderstanding, which might lead to recriminations and cause our good faith to be suspected, we have deemed it necessary to state the situation fairly and squarely, such as it appears in the constitutional theory and practice of our country.

[520] His Excellency Count **Tornielli** states that he expected that others more competent than himself because of their special study of the American constitutions, and in the first place of the Constitution of the United States of North America, would address themselves to point VI of the program of the day. Therefore, he will confine himself to interpret the meaning that he believes may be given to Article 4 of the American proposition now coming to discussion.

This article seems to have been proposed in order to notify all the States that might enter into a general arbitration treaty with the Washington Government, that the latter believes that in each particular case there can be no arbitration without the conclusion of a *compromis* between the parties in dispute.

This is information, Count Tornielli adds, for which we must be grateful to our colleagues of the American delegation, and the more so because they themselves tell us that the *compromis* is a special act which must be established conformably to the respective constitutions and laws of the signatories.

The first delegate from Italy continues his remarks by saying: As for myself, I am sufficiently informed regarding the significance of the article we are now discussing. It means, for instance, that when an arbitration case arises between the United States of America and Italy, Italy is bound once and for all, and her executive power has but to carry out the engagements resulting from the treaty after the international act shall have been ratified according to the Italian constitutional forms. On the other hand, to execute the principal treaty which its constitutional powers shall have approved, the Government of Washington will notify Italy to enter into a new convention, that is to say, a special act, the *compromis,* which itself will require to be approved by the Senate. There is an evident inequality of obligations which the two parties will have contracted in signing the general treaty.

But there is a means, I would say, a circuitous way, by which this undeniable inequality may be removed. In a large number of special arbitration conventions, the case has been provided for if the parties should not come to an understanding as to the *compromis*. By departing from the practice that comes to us from the provisions of the civil law of certain countries, the Governments now admit that there may be arbitration without the *compromis*. Formulas in this respect abound: let me cite the one that Italy has included in her treaty with Denmark. It reads as follows:

> In the absence of a special *compromis,* the arbitrators shall decide on the bases of the claims formulated by the two parties.

We have before us a German project of the highest importance; Articles 31 *a,* 31 *b,* 34 *a* are conceived along the same line of thought.

The application of arbitration is guaranteed even in case the *compromis* cannot be effected. I wonder if the United States of North America can accept clauses conceived in that sense? It is a point upon which we must be thoroughly informed, especially for the case where the system of contractual obligations arising from the mere signature of the English protocol were to be adopted by

the Conference. Gentlemen, my country may indeed knowingly assume obligations toward another country which reserves to its constitutional powers the approval of the *compromis* when regard for its interests demands that it do so; but if in the general convention which my country contracts for the one and for the other of the matters foreseen in the English protocol, the name of the United States will be entered beside that of Italy, my country then will find itself obligated towards the great American Federation in hardly desirable conditions of inequality.

The Italian delegation will not vote for the article which is proposed in No. VI of the program of the day save in case the delegation from the United States is in position to declare that in the absence of a *compromis*, arbitration may nevertheless take place.

[521] His Excellency General **Porter**: The suggestion of Count TORNIELLI brings up an entirely new question.

In principle it seems to us, however, that it is very dangerous for a State to surrender its right of concluding the *compromis* which is frequently more important than the arbitration convention itself.

Moreover, whatever the organ to which might be entrusted the task of arranging the details of the *compromis*, the Government of the United States would remain responsible for them in the conditions defined by the American constitution and the American laws.

The **President** wonders if it is proper to preoccupy oneself now with the special conditions under which a *compromis* must be concluded in some particular State. Why go here into all these details?

Provided a State obligates itself to perform in good faith the obligations which it has contracted, is it necessary to foresee that it will seek for pretexts to avoid them? And is this refusal not always possible, even when the executive power is the only one that has to give its approval? Has it not even been provided for in the project of the Permanent Court?

His Excellency General **Porter** replies that the stipulation included in Article 4 of his project has for its object to put before the whole world the exact situation, and that it is information for all the Powers.

His Excellency Mr. **Martens** thinks that this stipulation is useless. Any State signing a convention must know the constitutional organization of its cocontractant. Even if an inequality arises in this respect, it devolves upon the parties to take it into account.

It is needless to say that when a treaty has been concluded, it will be carried out conformably to the constitutional laws of each State. That goes without saying. And in this connection he recalls the arbitration case of the "French Shores," in which the Newfoundland Parliament refused to draw up a *compromis*. His Excellency Mr. MARTENS proposes, therefore to expunge Article 4.

His Excellency Mr. **Hammarskjöld** distinguishes the two aspects under which one may view the *compromis*. Now it is looked upon as a new convention, and at another time as an act of procedure. He is of opinion that the latter way of looking at it is more correct.

For if the *compromis* were a new convention the arbitral convention, which is the more fundamental, would lose pretty nearly all its obligatory value. And as it is essential that any convention should be voluntarily concluded, each of the parties would have the right in full liberty, to establish the *compromis*.

If the words "conformably to the laws, etc." convey the idea that each Government must submit to the fundamental and other laws of the State, they are useless: if, on the contrary, they have as their object to stipulate that the *compromis* must be regarded as a new convention and that an arbitral convention is only a promise to conclude, they are very dangerous.

His Excellency Mr. HAMMARSKJÖLD concurs in the remarks of his Excellency Count TORNIELLI and requests a provision for the case of refusal to sign the *compromis,* a case that may occur under the sway of all constitutions. He, moreover, calls for the omission of the words "conformably to the laws, etc."

His Excellency Mr. **Milovan Milovanovitch** views the matter thus:

If it is admitted that the *compromis* is not essential and that the arbitrators may get along without it, if necessary, he stands ready to accept the pro-
[522] posed omission, but in the contrary hypothesis, he believes it necessary to retain Article 4 of the American project by taking into account the explanation furnished by the delegation from the United States. The provision relative to the fulfillment of the formalities required by the constitutional laws in no way weakens the international bond, and that is the general principle. And not only has this principle not been put in doubt on this occasion, but, on the contrary, the delegation from the United States has just declared that the United States means really to assume an obligation and agrees to fulfill it in good faith.

His Excellency Mr. **Mérey von Kapos-Mére** finds in the question that has been brought up a difficulty which does not lie merely in the phraseology.

He may here refer to the case in which the Austro-Hungarian Government, upon the initiative of the United States of America, had concluded with this latter Power an arbitration treaty. Now this treaty has not been approved by the American Senate, because the latter meant to reserve to itself expressly the right to approve all *compromis.*

The difficulty encountered at that time still exists. Of course, it is with good faith that the Government of the United States means to sign an arbitration treaty, but we have here an inequality of fact. While the other States have bound themselves for the *compromis* at the time of signing the arbitration convention, the American Government is not so bound. It has engaged to do that which was not in its power to engage to do. The other Governments, on the contrary, can make a clear cut engagement because their executive power alone is involved. Now here is the alternative to which we are exposed: either the American Senate will not ratify the general arbitration convention, or it will interpret it in the sense that each *compromis* must be submitted to it, and then the obligation will no longer exist.

Mr. **Eyre Crowe** believes that the objection raised applies as well to almost all the European constitutional States as it does to those of the American continent. He states that if, as he hopes, the Conference adopts the establishment of a prize court, it will be necessary in order that the English Government may have the stipulations of the convention carried out, to ask the British parliament for several important legislative modifications. But, in theory is it not possible to foresee the refusal of the parliament?

His Excellency Baron **Marschall von Bieberstein** thinks that the two questions are absolutely different. In the case cited by Mr. CROWE, we are concerned with the presentation of a treaty to the parliament; the Government will in such case await the assent of the legislative power in order to ratify it. But in the

hypothesis of the American Article 4, the *compromis* would in certain countries be ratified directly by the executive power, which would thenceforth be bound, whilst in other States it would have to be submitted to a senate which, with regard to effecting the *compromis,* reserves to itself full and complete freedom of action.

Mr. **Eyre Crowe** calls attention to the fact that in England ratification of treaties does not at all depend upon the assent of the legislature. Nothing prevents a treaty from becoming ratified before the legislative measures necessary to insure its being carried out are submitted to parliament.

His Excellency Mr. **Carlin** expresses himself along the same line as did his Excellency Mr. MÉREY VON KAPOS-MÉRE, adding that the arbitration treaty signed by Switzerland and the United States of America in Washington, November 21, 1904, has likewise not been ratified by the Senate of the United States.

[523] His Excellency Mr. **Nelidow** holds that when a treaty submitted to parliament has been approved, it must be carried out by the two parties. And in the present matter, once the arbitration convention shall have been concluded, the parties are obligated to effect the *compromis* upon which they must agree. In the United States, on the contrary, each *compromis* must receive further legislative sanction before becoming obligatory, so that the European States will be bound, whilst the United States will not yet be bound, its obligation being subject to a potestative condition.

His Excellency Mr. **Luis M. Drago** states that in the Argentine Republic an arbitration treaty must be submitted for the approval of the congress, but the *compromis* is regarded as an executory act of the treaty and may be concluded by the executive power all alone.

His Excellency General **Porter** states that, after all, we are here dealing with only a matter of internal law. When two States have concluded a convention and two Governments agree upon a *compromis,* their responsibility is involved; and there is no need of inquiring as to which branch of the Power has drawn up the *compromis.*

Mr. **James Brown Scott** observes that in practice the approval of the Senate has been disregarded with regard to the establishment of a *compromis.* In the arbitrations relative to the "California Pious Fund" and to the "Venezuelan Affair," merely the right to submit the *compromis* to the Senate was reserved.

As regards the case cited by Mr. MÉREY he desires to state that, the treaty not having been ratified by the Senate, the matter of the *compromis* could not be brought up.

Mr. JAMES BROWN SCOTT concludes by saying that doubtless the objection based upon the constitutional organization of certain American States has greater weight with the adversaries of the principle of obligation than with its persistent advocates. The danger is purely academic and non-existent except in the minds of those opposed to obligatory arbitration, and who seek an indirect means of obstructing it.

> We are ready to sign—adds Mr. SCOTT—a treaty of obligatory arbitration, and we insist that for its execution confidence be placed in our good faith just as we trust to the good faith of others.

His Excellency Count **Tornielli** states that his country is known for the part it has taken in the practical development of the institution of international arbi-

tration. Its readiness and good faith in the accomplishment of the obligations resulting from the conventions it signs cannot be questioned. But the Italian delegation is in its right in desiring to know upon what conditions it engages its Government, and it is looking forward to finding out if, in the absence of the *compromis,* the United States is willing that arbitration may take place in virtue of a contractual clause especially referring to this case.

His Excellency Mr. **Francisco L. de la Barra** states that according to the constitution of the United States of Mexico a treaty ratified by the Senate has legal force, and, in consequence, must be fulfilled.

His Excellency Mr. **Ruy Barbosa** declares that the constitutional principles are the same in Brazil.

[524] His Excellency Mr. **Martens** believes that it is difficult to distinguish between an arbitral treaty and a *compromis.* Very frequently the *compromis* is indicated in an arbitral treaty as in the case of the Washington treaty of 1871 dealing with the case of the *Alabama.*

Mr. **Eyre Crowe** thinks that the first delegate from Italy was wrong in stating that the United States was not bound by an arbitration treaty so long as the *compromis* was not signed and approved by the legislative power. A treaty which is ratified binds it as absolutely as any other State; the execution only of the contracted obligation is subject to certain formalities.

As regards the suggestion of Count TORNIELLI, to the effect that arbitration may proceed without a *compromis,* Mr. CROWE does not believe that Great Britain, on her part, can accept the obligation of submitting to an arbitration, unless the question to be settled by the arbitrators has been previously defined.

His Excellency Count **Tornielli,** without going into useless details, declares that the American Article 15 contains an explicit reservation in favor of the right of the Senate. He confines himself to asking once more of the delegation from the United States for an answer to the question already put to it, and declares that if this answer is not in the affirmative he will vote against their proposition.

His Excellency Mr. **Carlin,** to enlighten the committee, calls attention to the fact that the Senate of the United States of America has not absolutely refused to ratify the arbitration treaty concluded with Swizerland. But it asked that, in the act of ratification, the reservation be made that each arbitration case should be preceded by the conclusion of a *compromis,* which would depend on the consent of the Senate. It is in these circumstances that the President of the United States of America withdrew the treaty.

Mr. **James Brown Scott** declares that the answer to the question of his Excellency Count TORNIELLI will be found in the discourse pronounced by Mr. CHOATE in the committee in which he squarely states that the Government of the United States must reserve unto itself the right to conclude *compromis* without the assistance of a special committee, and that it cannot surrender its right to specify the questions that are to be submitted to arbitration.

Referring to the remarks of Mr. CROWE, he repeats that the United States is bound by any treaty ratified by its Senate, but that the Government must reserve the rights of the latter of not merely ratifying, but amending it as well.

Mr. **Louis Renault:** In this whole discussion there is an expression which seems to me, after all, to play a very important rôle: it is that of good faith.

I am much surprised that certain countries in which the Government can

sign a *compromis* without the approval of the Senate so bitterly criticize the constitutions of other States where this formality is necessary.

For frequently the Government which *does not have to submit the compromis* to the Chambers will not be in position to carry out this *compromis* without a parliamentary approval. Let me cite a famous case:

In the *Alabama* case the Washington treaty of May 8, 1871, which was really a *compromis,* was submitted for the approval of the American Senate. Then, for the fulfillment of the award, Great Britain was obliged to go before parliament to secure a credit of $15,000,000.00. Could the British Government alone carry out the award? Not at all. The only difference is that in America it is necessary to advise with the Senate before concluding the *compromis,* and in England the approval of the parliament is required after the award has been made in order to carry out the latter. In the two cases there is always
[525] a moment when the aid of parliament will be necessary and when good faith has to play the principal rôle.

I shall refer to still another case: for a long time the French Government had had difficulties with the United States with regard to claims dating back to the time of the Empire. The July Monarchy brought an end to these controversies by resorting to arbitration. It was condemned to pay 25,000,000 francs for damages. But on the eve of overturning the ministry, parliament refused to vote the necessary appropriations. Impossible henceforth to fulfill its obligations, the French State did not regard itself as released from its debt, and under the following ministry the amount was called for from parliament; it was appropriated and paid.

Gentlemen, I believe that a case similar to the latter may occur *in all cases where arbitration is provided for* either through a world treaty, or through a convention between two States.

The fulfillment of the decisions is the duty of the Governments; but the manner of carrying them out is a matter of internal law with which we have nothing to do. For this we must rely upon the good faith of the parties.

If we have not confidence in the good faith of the parties, the logical conclusion would be not to enter into any sort of international engagement.

All we can wish for is to decrease the arbitrary element as far as possible.

His Excellency Baron **Marschall von Bieberstein** is of opinion that it is necessary to distinguish, on the one hand, arbitration treaties concerning a dispute which has already arisen and containing stipulations regarding the execution of the obligation for recourse to arbitration and, on the other hand, those treaties by which the parties mean to submit to arbitration future, eventual controversies.

The Washington treaty referred to belonged to the former of these two categories: it was unnecessary to make a *compromis.*

But, as for the other arbitration conventions, there is not a situation of equality between the two parties when for one of them the *compromis* is obligatory by the mere ratification of the Government, whilst for the other it cannot become obligatory without having been submitted to the discretion of a parliamentary assembly.

His Excellency Mr. **Mérey von Kapos-Mére** desires, in a few words, to reply to the remarks of Mr. Scott.

If he referred to the non-ratification by the American Senate of the arbi-

tration treaty concluded between the Government of the United States and that of Austria-Hungary, it was for the purpose of setting forth the reasons that on this occasion animated the high American assembly.

He desires also to inform Mr. SCOTT that the objection raised is in no way a pretext invoked by the adversaries of obligatory arbitration; for this purpose, it will no doubt suffice to call his attention to the fact that Italy and Sweden, whom we could hardly suspect of being opposed to the principle of obligatory arbitration, but who, on the contrary, have always proven themselves its enthusiastic partisans, absolutely share his way of looking at the matter.

His Excellency Mr. **Ruy Barbosa** delivers the following discourse:

I take the liberty of participating in this discussion in order to support what has just been said, with as much reason as with logical clearness, by our eminent colleague Mr. LOUIS RENAULT.

To my mind, the judgment which he has irrefutably established is of a most
[526] striking nature. To my neighbor, Mr. D'OLIVEIRA I had but just expressed the same thought when the illustrious delegate from France began to speak. Mr. RENAULT has indeed demonstrated that, even in the countries where the intervention of the Senate is not required to effect the *compromis* and to ratify it, as happens to be the case in the United States, the *compromis* may fail of being established through a parliamentary obstacle which does away with and annuls the action of arbitration. Still, the arguments of Mr. RENAULT have been opposed by alleging that the *Alabama* case, around which they centered, was not a case in which the *compromis* was essential.

But have we need to refer to this case in order to prove that the system of international arbitration will never remove all possible obstacles of a constitutional nature? No. I am going to make you realize that fact in an absolutely decisive way.

Arbitration matters generally result in pecuniary condemnations. Usually the point to be settled is to recognize a contested debt, or to see if damages should be allowed and to determine their amount. If, therefore, arbitrators allow the claim, the debtor State or the one responsible for the damage, will have to pay out a certain amount of money, to acquit itself of the obligation established in the decision.

But, as far as I know, in all constitutional countries public expenditures are controlled by the legislative power. It is the parliament, that is to say the union of the two national chambers, which examines the legitimacy of the disbursement, determines it or authorizes it. It is the parliament which holds the purse strings. These strings cannot be untied without its positive approval.

Now then! see how things happen in international arbitration cases. An agreement has been reached. The *compromis* has been signed without objection by the Government of the country to which the request had been presented. The decision has pronounced its condemnation. But at the moment of carrying out this decision, lo and behold! the Government is held up by parliamentary intervention. Parliament cannot be overlooked. An expenditure is to be met, therefore a credit or a budgetary appropriation must be secured. If the means for acquitting the debt are not consigned in the budget or in a special appropriation, then the expenditure is not authorized; it cannot be effected. The arbitral decision will not be carried out. And, as there is no means of compelling a parliament, since it is irresponsible, as it is sovereign within the competence of its

functions and its acts are without appeal, its refusal would be an invincible obstacle to the fulfillment of the decision. It would nullify arbitration.

In the case of the *compromis* before the American Senate, it is but one chamber that decides. Here we are confronted by the two. This is legislative authority in its completeness. Without exceeding the limits of its competence it could, if so disposed, render almost all arbitral decisions useless, for they could not be carried out without the financial agreement of the legislative body.

Why, then, is it not said that parliamentary intervention in the execution of arbitral decisions is opposed to arbitration? Why is it not affirmed that, in an arbitration treaty between an autocratic country and a constitutional country, only the former is obliged, because of the option left to the parliament of the latter to oppose the expenditure implied in the pecuniary condemnation?

The scandal that would arise from the impotence of acquitting oneself of the arbitral obligation would be even greater in cases of this nature than in those feared on the part of the American Senate. For in these cases the obstacle would arise on the threshold of the matter, on the occasion of the *compromis,* which precedes the opening of the suit, whilst in the former cases, it is the decision itself that would fail after the thing had been adjudicated.

[527] Let us not criticize the American Senate; for more plausible reasons we might criticize all the parliaments of the world. It is not a speciality of the Constitution of the United States. Under a more serious form, the thing is common to all existing constitutions. We must not change the constitutions to adapt them to arbitration. On the contrary, arbitration must be adapted to the constitutions as they now exist. Does this mean that they create difficulties, really insurmountable to arbitration? No. The highest guarantee of arbitration lies in the honesty of the nations, in the honor of the States. If we can believe that they will profit by constitutional obstacles to avoid arbitration, then we must indeed despair of the latter, for the peoples will never place arbitration above their constitutions. In arbitration, as in all human institutions, we will always find something that is imperfect, uncertain, and dependent upon events. If to remove the last of all these difficulties, we begin to dig and dig down to the center of the earth, we will always find new ones, and we will never reach the desired result.

The **President** believes that the Conference is not empowered to examine by what means a treaty already signed must be ratified, and how a State will in good faith carry out a solemn engagement. We cannot arrogate unto ourselves the right to examine, when a State shall have contracted an obligation, whether it will keep its promises.

He then puts to a vote Article 4 of the proposition of the United States of America.

Voting for, 10: Serbia, Great Britain, Argentine Republic, the Netherlands, United States of America, Mexico, Switzerland, Brazil, Portugal and France.

Voting against, 7: Germany, Italy, Greece, Austria-Hungary, Sweden, Russia and Belgium.

The committee begins the discussion of *point VII of the program of the day* (Austro-Hungarian proposition).[1]

[1] See annex to the minutes of the thirteenth meeting of the committee of examination A.

His Excellency Mr. **Mérey von Kapos-Mére** takes the floor:

The text of the resolution as well as the statement of its reasons being now in the hands of the members of the committee, I desire to add but a few words to make very clear the origin, the contents and the scope of my proposition. At the same time, I shall attempt to answer in advance certain objections that I foresee or that might be offered in opposition to my project.

The resolution, as I have taken the liberty of submitting it for the appreciation of our committee is, in my judgment, the result of our discussion.

As I have already had the honor to state the other day, I am of opinion that, if we have devoted and if we are still devoting a considerable time to the discussion of the matter of obligatory arbitration, this so interesting and profound discussion was in no way unprofitable and will not be without results. But what result have we already obtained? In the first place, I may say: the unanimous agreement to the principle of the application of obligatory arbitration to certain international conventions, or to certain parts of international conventions. It [528] is precisely in the first part of my resolution that there may be found the statement or the confirmation of this principle. It seems to me that the latter is there expressed more clearly, more directly and more solemnly than in the different phraseologies which have been proposed for Article 16 of the Convention of 1899.

As to the practical and definitive application of the principle of obligatory arbitration, two conflicting opinions have manifested themselves in our committee. A certain number of our colleagues find that even now we might agree upon a definitive stipulation that should contain a list or a more or less extended table of the conventions in question. Another part of our committee finds that it would be better to leave it to the Governments and especially to the competent departments to make a preliminary examination of the technical and juridical details. It is along this line of thought that the second part of my resolution was conceived.

It probably will be objected in regard to my project that the form itself of a resolution is rather discredited. This is the reason why I have endeavored to make it as earnest and as obligatory as possible, by fixing a period of time upon the expiration of which the preliminary process should be completed, and by imposing upon the Governments the obligation to give notification of the result of this process.

It may possibly be also objected that this resolution is not accompanied by a list. As for myself, I must confess that in this I see an advantage in my proposition. For why should we determine upon a list that some might find too lengthy, and others too short? We are all acquainted with the source of this list. It was drafted at the last meeting of the Interparliamentary Union, and was to serve as an indication, as a model to be followed. Can it be said that this list is complete? As for myself, I doubt it.

The greatest advantage of my proposition lies in the fact, according to my judgment, that everybody can accept it without surrendering his point of view. After the expiration of the period of time foreseen some will, so to say, make a generous offer, and the rest will confine themselves to accepting obligatory arbitration only for a restricted number of matters.

Even if this resolution were not accepted by a majority of the members of this committee, it may meet with a kinder fate in the Commission. For we

must not forget that several of our colleagues, like myself, have voted for a certain number of points of the Anglo-Portuguese list upon the express condition that the totality or almost the totality of the States represented at the Conference accept a definitive list, even though it were a very restricted one.

I take the liberty, therefore, of commending the resolution to your kind consideration.

His Excellency Count **Tornielli** expresses himself as follows:

At our meeting of August 23, I had the honor of formulating in your presence, and in the name of the Italian delegation, a reservation with regard to the significance to be attributed to the votes that we were asked to cast upon each of the points included in the English, Portuguese and other lists.

It was agreed that, only after the vote upon the points should be concluded, we would all of us be able to form an opinion concerning the importance of the list resulting therefrom. Our distinguished PRESIDENT was good enough to tell us, in terms most gracious for me, that he accepted my suggestion. And we have indeed taken up one after another each of the points that we had before us; successively we have given our judgment upon each, and in doing so, we have in no way pledged our final vote. Permit me to add, gentlemen, that our [529] honored PRESIDENT informed us on the same occasion, that by this method we would draw nearer the goal that we never lose sight of: to depart from here in agreement.

Such indeed is the main object which we must have in view, an object we must not for a single moment lose sight of and to which the Italian delegation has, by its instructions, been directed to give its support.

To that end we must have the courage to look things squarely in the face.

To put it briefly and not to exhaust your kind attention, I shall employ expressions not rhetorical, but expressions that shall remove every misunderstanding possible and sufficient to make us understand one another.

We have before us two different systems.

The one wants no reservations, no lists, but merely the declaration by the Conference of the principle of obligatory arbitration and the engagement on the part of the signatory Governments mutually to notify to each other those matters which they are ready to submit to arbitration without reservation.

The other system, on the contrary, desires to have the declaration of the principle of obligatory arbitration accompanied by general and explicit limitations, of the application of which each of the parties remains the sole judge, while at the same time consenting not to avail itself of these limitations for a certain number of cases already determined.

It would truly be an abuse of your patience if I were to restate the arguments that can be adduced in support of the one as well as of the other of these two systems which, if we will but take into account the substantial part of things, seem to differ one from another by a distance which love of concord should aid us, I was about to say compel us, to negotiate.

In looking at the votes upon the articles of the list, I presume that we all agree that concentration of our votes upon each of these articles has been very weak. Of eighteen voters, the maximum majority obtained did not exceed two-thirds. And this majority was attained for only one single article. Upon six other articles, eleven votes were secured of the eighteen. Although it is now impossible to make a formal statement in this matter, I do not believe that I am

mistaken in saying that the scattering of the votes would appear even greater if we bore in mind that in this voting each of us was inspired by very different ideas, so that not even the same delegations have acted together in the formation of these majorities. Not conclusive in themselves, these majorities, therefore, lack even homogeneousness.

Gentlemen, after stating these facts, I ought to tell you that the preferences of the Italian delegation are for the system that should include: 1, the formal declaration which the Conference is happily in position to make, to the end that a unanimity of the Powers was secured for the application of obligatory arbitration in disputes concerning matters of a juridical nature, and in the first place, in the questions of the interpretation or the application of international conventions; 2, the engagement of the Powers to notify to one another the matters which they are ready to submit to arbitration without reservation. If I had to give to you the reasons for this preference, I should not hesitate to reproduce the eloquent words that one of our most sympathetic colleagues pronounced immediately after I had ceased speaking in our meeting of last Friday. You will find these words *in extenso* in our minutes. I shall merely avail myself of the conclusion. Yes, Gentlemen! It is because the Italian Government is also a sincere partisan of obligatory arbitration that the delegation, while at the same time appreciating the relative merit of several of the propositions
[530] that are submitted to us, recognizes the difficulties of their being put immediately into practice, and is of opinion that the propositions containing lists of conventions for which exception should be made to the general provision establishing reservations, instead of simplifying the question, would seriously complicate it. I omit all arguments of a juridical nature; but, bearing in mind the votes upon the different points included in the list, I yield to a feeling of political opportunism, and I declare that we have every reason for foreseeing the unsatisfactory impression that our anodyne list would have upon public opinion, which for nearly three months has trusted us, but which has also watched us.

In the presence of that which has been proclaimed in a very recent congress held in Germany, this public opinion might severely criticize our procedures and our work. Let us give time to our Governments to do well the work for which we are neither prepared nor sufficiently equipped.

Gentlemen, in laying before you the reasons for its preference, the Italian delegation departs neither from the principle nor from the traditions which in the boldest applications of international arbitration have put Italy in the vanguard of the nations. Moreover, it is to these principles and to these traditions that we propose to remain faithful in our subsequent resolutions.

In the meantime, the question now before us is to pronounce ourselves upon the choice of the one or the other of the two systems. It is time that we should settle this point. Do we desire the list, no matter how restricted it may be, or do we prefer the declaration of the principle without reservations, and the engagements of the Governments to pronounce themselves upon the matters to which that principle may be applied?

We represent here but eighteen States of the forty-five. In order to clear the field of the obstructions that have interfered with us up to the present time, would it not be necessary that the matter of the choice between the two systems should be settled by a vote of the Commission? This is the question I put before you.

Their Excellencies Messrs. **Mérey von Kapos-Mére,** Baron **Marschall von Bieberstein** and Mr. **Carlin** state each in turn that they concur in the proposition of Count TORNIELLI.

His Excellency Sir **Edward Fry** desires to have it appear that the procedure advocated by Count TORNIELLI would cause much delay, and that it would not be easier for the Commission than for the committee to settle the question.

His Excellency Mr. **Martens** is of opinion that in case the proposition of Count TORNIELLI were adopted the work already accomplished by the committee, so to speak, would be lost, the Commission itself would have to undertake a new study, and, this study concluded and the question settled, the committee would have to return to its task. In consequence, he is opposed to the proposition of Count TORNIELLI and believes that it would be better to continue the labors of the committee until it be able to lay a clear-cut and well-defined proposition before the Commission.

The **President** in his capacity as a member of the committee, states that he cannot concur in the view expressed by Count TORNIELLI and the other delegates who desire to substitute the Commission for the committee by inviting the former to solve the question itself.

He believes that the moment has not come to request the Commission to cast a final vote in the place of the committee. This would be a confession of impotence and incompetence on the part of the latter. He believes, on the contrary, that the labors of the committee have been interesting and useful and that, in consequence, it would be proper to have them continued.

In the course of the discussion we have almost continually found a [531] majority, and it seems impossible that this majority should surrender its position now.

The committee has adopted a certain number of articles, but when it goes before the Commission it will not dissimulate that this adoption has been simply reached by a majority.

The latter will defend its view-point before the Commission even as a minority will be free to defend its own. In this way the partisans of all and any opinions may set forth their arguments, and it will then devolve upon the Commission to decide. The PRESIDENT wishes to emphasize the fact that the proposition of Count TORNIELLI would lead to the same result, but that it would cause a serious delay. It would, moreover, imply a criticism of the labors of our colleagues which we are not entitled to inflict upon them.

His Excellency Count **Tornielli** declares that in presenting his proposition he has but desired to hasten the labors of the committee.

He is of opinion that it would be well even now to call for the advice of the Commission. The opinion of the majority of the committee would be but that of a very restricted portion of the forty-seven States represented in the Conference. A decision of the Commission in this respect would but clear the road for the work of the committee.

His Excellency Mr. **Martens** concurs in the opinion expressed by the PRESIDENT.

His Excellency Mr. **Mérey von Kapos-Mére** would like to emphasize an argument of a practical nature. If the Commission were even now to accept his proposition for submitting to the respective Governments the question of finding out what matters it would be proper to put in the list, the labors of the com-

mittee would thereby be considerably facilitated. On the other hand, if the committee does not previously ask for the opinion of the Commission upon this matter, all the studies now being prosecuted by the committee may become useless.

His Excellency Sir **Edward Fry** states that in his opinion it would be preferable to have the labors of the committee continued.

The **President** proposes to proceed to the discussion of *point VII of the program of the day.*

He sets forth that the difference between the Austro-Hungarian resolution and the protocol of the British proposition lies in the fact that the latter deals with the immediate establishment of obligatory arbitration in certain cases, whilst the Austro-Hungarian resolution would engage the signatory Powers only to give a reply, within a certain period of time, with regard to the question under discussion.

If the Austro-Hungarian proposition is to be interpreted as containing a legal bond, there would be but little difference between the two propositions. If, on the contrary, it does not imply a legal bond, he fears that the majority of the committee will not adopt it.

Mr. **Louis Renault** calls the attention of the committee to a certain contradiction that he thinks exists between the beginning and the ending of the Austro-Hungarian resolution. The first paragraph indicates already those disputes which, according to the committee, would be susceptible of obligatory arbitration, while the second paragraph declares the incompetence of the Conference to pronounce itself upon this matter.

His Excellency Baron **Marschall von Bieberstein** declares in favor of the proposition of Mr. Mérey which obligates the Powers to a serious exam-
[532] ination of this difficult matter. The German Government is not only inclined, on its part, to proceed with such a study, but entertains the hope that within a short time it would be in a position to present to the Government of the Netherlands practical propositions in this regard.

His Excellency Mr. **Mérey von Kapos-Mére** states that he consents to making some modifications of phraseology in his proposition in order to make it as clear as possible.

Then Mr. Mérey again states that he regards as a real advantage the fact that his proposition does not contain a list. He brings out that the list proposed by the Portuguese delegation, has, after all, been based upon the list drafted by the Interparliamentary Union, which, in his judgment, and from certain points of view, contains too many subjects, and from other points of view is not sufficiently complete. He does not see why we should even now establish a list as to the contents of which the committee is not sufficiently informed.

His Excellency Sir **Edward Fry** believes that, after having made a careful study and adopted a list of subjects, the committee cannot now accept a resolution the contents of which is contrary to the idea of the immediate enumeration of such matters. It would now be too late to adopt a resolution without a list, and it would be possible only to adopt the resolution as a subsidiary matter.

His Excellency Sir Edward Fry also believes that there is in some measure a contradiction between the two paragraphs of the resolution.

His Excellency Count **Tornielli** proposes to adjourn the sitting of the

committee until Mr. MÉREY shall have effected those modifications in his resolution to which he has just alluded.

Mr. **Martens** calls the attention of the committee to the terms of the Austro-Hungarian resolution by declaring that the study of the matter requires "such study as is beyond the competence of the Conference and can be entrusted only to experts."

His Excellency Mr. MARTENS believes that in adopting such a resolution, the committee would confess to incapacity and that it would be necessary to continue the study of the matter so long as this incapacity has not been proven.

His Excellency Baron **Marschall von Bieberstein** states that he cannot share the view expressed by his Excellency Sir EDWARD FRY.

The committee has not sufficiently looked into the matter of the list of subjects susceptible of obligatory arbitration. This point has not been fully brought to light.

His Excellency General **Porter** is of opinion that the lists of the different propositions are almost identical and that, to facilitate an agreement upon this matter, the question of phraseology is merely involved.

Consulted by the PRESIDENT, the committee decides to adjourn the prosecution of the discussion to its next meeting.

The meeting is closed.

Annex A

TEXTS ADOPTED BY COMMITTEE OF EXAMINATION A AND VOTES CAST IN THE MEETINGS OF AUGUST 23 AND 29

OBLIGATORY ARBITRATION

[534]

Date of the Votes	Origin of the Texts		Number of the Voters 18		
			For	Against	Abstentions
		Article 1			
August 23	*Proposition of the United States of America* [1]	Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests, or independence, or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute. (*Adopted without a vote.*)			
		Article 2			
		Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article. (*Adopted without a vote.*)			
August 29	*Proposition of the subcommittee presided over by Mr. Fusinato.* Article 1 [2]	The high contracting Parties agree not to avail themselves of the preceding article in the following cases: [3]			

[1] Annex 21, new corrected draft of August 23.

[2] Annex to the minutes of the 13th meeting of Committee A.

[3] The English delegation declares that the text of Article 16 *b* of its proposition, being in fact the equivalent of Section 1 of Article 1 of the subcommittee, should, in the interest of a correct phraseology, be substituted for this Section 1 of Article 1.

It declares, moreover, that no vote has been had upon the first paragraph of Article 16 *c* of its proposition, which is necessary for the understanding of the provisions adopted subsequently.

Article 16 *b*

The high contracting Powers recognize that in certain disputes provided for in Article 16 there are reasons for renouncing the right to avail themselves of the reservations therein set forth.

Article 16 *c*

With this in mind they agree to submit to arbitration without reservation disputes concerning the interpretation and application of treaty provisions relating to the following subjects:

Date of the Votes	Origin of the Texts		Number of the Voters 18 For	Against	Abstentions
		Disputes concerning the interpretation or the application of conventions concluded or to be concluded, and enumerated below, so far as they refer to agreements which should be directly executed by the Governments or by their administrative departments.			
		Article 16 *a*			
August 23	*British and Portuguese Propositions.*[1]	A. Interpretation and application of treaty provisions concerning the following matters:			
		1. Customs tariffs	9	2	7
		2. Measurement of vessels	11	4	3
		3. Wages and estates of deceased seamen	10	3	5
		4. Equality of foreigners and nationals as to taxes and imposts	10	4	4
[535]		5. Right of foreigners to acquire and hold property	9	5	4
		6. International protection of workmen	11	2	5
		7. Means of preventing collisions at sea	11	2	5
		8. Protection of literary and artistic works	9	4	5
		9. Regulation of commercial and industrial companies	9	4	5
		10. *a.* Monetary systems	9	4	5
		b. Weights and measures	11	3	4
		11. Reciprocal free aid to the indigent sick	12	2	4
		12. Sanitary regulations	9	7	2
		13. Regulations concerning epizooty, phylloxera and other similar pestilences	8	6	4
		14. Private international law	9	3	6
		15. Civil or commercial procedure	9	4	5
		Article 16 *b*			
August 23	*Portuguese Proposition.*[2]	2. Taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck	8	7	3
		5. The right of foreigners to pursue commerce and business, to practice the liberal professions, whether it is a case of a direct grant, or of			

[1] Annexes 32 and 34

[2] Annex 34.

Date of the Votes	Origin of the Texts		Number of the Voters 18		
			For	Against	Abstentions
		being placed upon an equality with nationals	5	9	4
		10. Patents, trade-marks, and trade name	4	9	5
		12. Monetary systems; weights and measures; geodetic questions	6	7	5
		13. *a.* Reciprocal free aid to the indigent sick	11	3	4
		b. Conventions providing for repatriation	8	3	4
		14. Emigration	5	6	7
		Article 16 *a*			
August 23	*British Proposition.*[1]	B. Pecuniary claims for damages when the principle of indemnity is recognized by the parties	11	4	3
		Article 18			
August 23	*Swedish Proposition.*[2]	2.) In case of pecuniary claims involving of the interpretation or application of conventions of every kind between the parties in dispute	9	6	3
		3.) In case of pecuniary claims arising from acts of war, civil war or the arrest of foreigners or the seizure of their property	7	6	5
[536]					
August 29	*Serbian Proposition.*[3]	Postal, telegraph and telephone conventions	8	3	7
August 29	*Proposition of the subcommittee presided over by Mr. Fusinato.* Article 2[4]	If all the signatory States of one of the conventions enumerated herein are parties to a litigation concerning the interpretation of the convention, the arbitral award shall have the same force as the convention itself and shall be equally well observed. If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time and they have the right to intervene in the suit.	13	3	2

[1] Annex 32. [2] Annex 22. [3] Annex 29.
[4] Annex to the minutes of the 13th meeting of committee A.

Date of the Votes	Origin of the Texts		Number of the Voters 18		
			For	Against	Abstentions
		The arbitral award, as soon as it is pronounced, shall be communicated by the litigant parties to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the convention itself. In the contrary case, the judgment shall be valid only as regards the matter which formed the subject of the case between the litigant parties. It is well understood that the present convention does not in any way affect the arbitration clauses already contained in existing treaties.			
		Article 16 *d*			
August 29	*British Proposition.*[1]	The high contracting Parties also decide to annex to the present convention a protocol enumerating: 1. Other subjects which seem to them at present capable of submission to arbitration without reserve. 2. The Powers which from now on contract with one another to make this reciprocal agreement with regard to part or all of these subjects.	10	5	3
August 29	*Protocol contemplated in Article 16 d of the British proposition.*[2]	1. Each Power signatory to the present protocol accepts arbitration without reserve in such of the cases listed in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it makes this engagement with each of the other signatory Powers whose reciprocity in this respect is indicated in the same manner in the table. 2. Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table with respect to which it may not already have accepted	10	4	4

[1] Annex 39.

[2] Annexes 39 and 40.

[537] Date of the Votes	Origin of the Texts		Number of the Voters 18 For	Against	Abstentions
		arbitration without reserve. For this purpose it shall address itself to the Netherland Government, which shall have this acceptance indicated on the table and shall immediately forward true copies of the table as thus completed to all the signatory Powers. 3. Moreover, two or more signatory Powers, acting in concert, may address themselves to the Netherland Government and request it to insert in the table additional subjects with respect to which they are ready to accept arbitration without reserve. These additional matters shall be entered upon the table, and a certified copy of the text as thus corrected shall be communicated at once to all the signatory Powers. 4. Non-signatory Powers are permitted to adhere to the present protocol by notifying the Netherland Government of the matters in the table with respect to which they are ready to accept arbitration without reserve.[1]	10	4	4
August 23	*British Proposition.*[2]	ARTICLE 16 *b* It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force. (*Adopted without a vote.*) ARTICLE 16 *c* Article 16 *a* does not apply to disputes concerning provisions of treaties regarding the enjoyment and exercise of extraterritorial rights. (*Adopted without a vote.*)			

[1] It is understood that the phraseology of the English protocol shall be harmonized with the text of the articles of the FUSINATO subcommittee.

[2] Annex 32.

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Annex B

TEXT OF ARTICLES 16–16 *h* ADOPTED BY COMMITTEE OF EXAMINATION A IN THE MEETING OF AUGUST 31, 1907

Article 16

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests, or independence, or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

Article 16 *a*

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

Article 16 *b*

The high contracting Parties recognize that certain disputes provided for in Article 16 are susceptible of being submitted to arbitration without reservation.

Article 16 *c*

With this in mind they agree to submit to arbitration without reservation the following disputes:

1. Controversies concerning the interpretation and application of conventional stipulations relative to the following matters:

a. .....
b. .....
c. .....
d. .....

etc., etc., etc.

II .....
III .....

Article 16 *d*

The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

1. other subjects which seem to them at present capable of submission to arbitration without reserve.

2. the Powers which from now on contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

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Article 16 *e*

It is understood that the conventional stipulations mentioned in Articles 16 *c* and 16 *d* shall be submitted to arbitration without reservation, so far as they refer to agreements which should be executed directly by the Governments or by their administrative departments.

ARTICLE 16 *f*

If all the signatory States of one of the conventions mentioned in Article 16 *c* and 16 *d* are parties to a litigation concerning the interpretation of the convention, the arbitral award shall have the same force as the convention itself and shall be equally well observed.

If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time and they have the right to intervene in the suit.

The arbitral award shall be communicated to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the convention itself. In the contrary case, the judgment shall be valid only for the litigant parties.

ARTICLE 16 *g*

The procedure to be followed in order to bring about adhesion to the principle established by the arbitral decision in the case referred to in paragraph 3 of the preceding article, shall be as follows:

If a convention establishing a union *with* a special bureau is involved, the parties that have taken part in the suit shall transmit the text of the decision to the special bureau through the medium of the State within whose territory the bureau has its headquarters. The bureau shall draft the text of the article of the convention conformably to the arbitral decision and communicate it through the same medium to the signatory Powers that have not taken part in the suit. If the latter unanimously accept the text of the article, the bureau shall establish the assent by means of a protocol which, drafted in due form, shall be transmitted to all the signatory States.

States whose reply shall not have reached the bureau within a year from the date of the communication made by the bureau itself shall be considered to have given their consent.

If a convention establishing a union *with* a special bureau is not involved, the functions of the special bureau shall be exercised by the Hague International Bureau through the medium of the Government of the Netherlands.

It is well understood that the present convention does not in any way affect the arbitration clauses already contained in existing treaties.

ARTICLE 16 *h*

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

[540]

FIFTEENTH MEETING

SEPTEMBER 3, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3:10 o'clock.

The **President** states that he has received the following communication from his Excellency SAMAD KHAN MOMTAS-ES-SALTANEH:

Mr. PRESIDENT: I have already had the honor to explain, in the eighth meeting of the first subcommission of the First Commission, July 27 last, the views and the sentiments of my Government concerning the principle of obligatory arbitration. It is in line with these sentiments that we have examined the propositions made in this matter by the delegations from Portugal and Great Britain, and I am happy to state that we are ready to vote for them; we hope that other propositions will complete those already presented and that they will take the matter of obligatory arbitration upon an even more solid ground. We will study them also with great interest, and we should be pleased to recommend them warmly to the approval of the Imperial Government.

His Excellency Mr. **Mérey von Kapos-Mére** in support of the resolution of the Austro-Hungarian delegation,[1] gives the following supplementary explanations:

The text of the resolution has been subjected to a slight modification in the phraseology in paragraph 2 in order to meet a remark made in the committee.

You have before you the corrected text[2] of the Austro-Hungarian resolution. The only change I made in it will be found in the second paragraph. In its former form it stated that the Conference would invite the Governments to submit, after the closing of the Hague meeting, the question of obligatory arbitration to a serious examination and profound study. It was, however, objected that in this manner the principle itself of obligatory arbitration would be submitted to the examination of the Governments, a principle which has already been recognized by the Conference. I accept the logic of this objection and I have taken it into account by giving greater precision, in the corrected text, to the idea that I desired to express.

[541] Apart from this modification, I feel that I can retain the remainder of the text of the resolution. After having explained it and repeatedly given reasons for it, it seems to me to be no longer necessary to refer to it in detail. If I am not mistaken, the resolution meets with the sympathetic approval of a rather large number of our colleagues. Under these conditions, it seems to me that the time has come to vote upon the Austro-Hungarian proposition.

[1] Annex 42.
[2] *Ibid.*

It is quite evident that even if the resolution were to receive a majority vote, I am prepared to examine the amendments that might eventually be proposed by any one of our colleagues, amendments which, without affecting the essence and the form of the resolution, would merely bear upon the minutiæ of phraseology.

His Excellency Sir **Edward Fry** desires to know if the resolution of the Austro-Hungarian delegation is meant to be substituted for the list and for the protocol that have already been adopted by the committee.

His Excellency Mr. **Mérey von Kapos-Mére** replies in the affirmative.

His Excellency Mr. **Carlin** asks how Mr. MÉREY figures that the legal bond will be formed on the basis of the draft resolution of which he is the author. According to the Swiss and British propositions, this bond is formed through the notifications which have been provided for, but the Austro-Hungarian resolution does not state how the *vinculum juris* is to be established.

His Excellency Mr. **Mérey von Kapos-Mére** states that the notification mentioned in the Austro-Hungarian resolution can indeed not be regarded as establishing the legal bond to which his Excellency Mr. CARLIN has just referred. It would be a mere declaration. Any interpretation attributing to it a wider meaning would be dangerous. In order to establish a *juris vinculum,* the act of notification would not offer the required certainty and precision. After this declaration, the resolution means to leave it to the Powers to agree upon the necessary stipulations.

His Excellency Sir **Edward Fry** wishes to know if in the judgment of Mr. MÉREY the resolution would be substituted in the place of Articles 1, 2 and 3 of the proposition of the United States.

His Excellency Mr. **Mérey von Kapos-Mére** believes that one might reply to this question either with a "yes" or a "no." Another proposition of the Austro-Hungarian delegation is directed to maintaining the former Article 16 of the Convention of 1899, to which it adds a new paragraph. This article together with the resolution would take the place of the American proposition.

His Excellency Mr. **Asser** desires to call the attention of Mr. MÉREY to a certain inequality which seems to exist between the first part of the resolution which refers to certain conventions, and the last paragraph which states that the Powers shall notify each other of the *matters* which they are willing to include in a stipulation regarding obligatory arbitration.

His Excellency Mr. **Mérey von Kapos-Mére** believes it to be desirable not to restrict to any list the examination of matters that might be susceptible of arbitration. As to the observation of Mr. ASSER, he readily acknowledges the logic of it and accepts the phraseology proposed by the delegate from the Netherlands.

Mr. **Georgios Streit** believes it to be preferable to include the matters in the resolution itself, instead of referring, as the resolution does, to the list of the Portuguese proposition.

[542] His Excellency Mr. **Mérey von Kapos-Mére** states that he is willing to omit in the resolution the entire passage containing reference to the list of the Portuguese proposition.

His Excellency Count **Tornielli** reminds the committee of the fact that in the meeting of August 31 he declared that, in the presence of the two contrary systems one of which means to establish a list even now, and the other of which

is opposed to the very principle of a list, it would be necessary to present an intermediate proposition.

While disposed to accept the resolution of the Austro-Hungarian delegation if it should receive an almost unanimous vote, Count TORNIELLI would prefer to submit to the committee a conciliating proposition more clearly formulating the ideas which he presented in the last meeting.

His Excellency Mr. **Ruy Barbosa**: Amid this confused mass of ideas, suggestions, projects, counter-projects, resolutions, and amendments, by which we are confronted, it is already very difficult to know what to do in voting, in order not to contradict oneself or not to say the contrary of that which one desires.

We have adopted the general formula with its necessary restrictions; I have voted for the principle of the list, and I have likewise, in the balloting, pronounced myself in favor of a majority of the obligatory arbitration cases specified in the British proposition. Nevertheless, it is rather to be feared that we will secure no unanimity for either of these two systems, nor even a decisive majority that might serve as a basis for a general convention of the States.

In adopting the list, the most of the items have obtained a majority, but not a large majority. And this majority varies with regard to each item so that there is reason to doubt if two cases might be referred to in which the composition of the majorities is the same.

In this eventuality which it is feared might arise, no list would be possible, even in reducing it to the most modest proportions, and then, in order to save at least an important part of obligatory arbitration, we would have to adopt the Austro-Hungarian resolution which does not immediately satisfy the wishes of the friends of arbitration, but which strengthens their position and opens to them in the near future a very wide field of development.

In this deliberation our votes must always be regarded as conditional, for our majorities are not even here conclusive, and when we are away from here we cannot say what there will be left of them in the Commission or in the Conference.

For this reason, after having up to this time adopted the system of the Portuguese proposition, that of the Swiss proposition as well as that of the British proposition, we shall likewise vote upon that of the Austro-Hungarian proposition, in case the English proposition which we regard as preferable should finally not secure the necessary majority.

His Excellency Mr. **Francisco de la Barra**: The Mexican delegation has cast its vote—under the reservation of the definitive vote—in favor of the obligatory arbitration project, worked out by means of the elements furnished by the propositions of the delegations from Great Britain, Portugal, the United States, and Switzerland. To-day it will vote in favor of the proposition presented by Mr. MÉREY, but desires to explain its vote. It believes that the Anglo-Portuguese-American project represents effective progress by the importance of the principles which it sanctions, by the precision of its terms [543] and by the ingenious system which it proposes. Nevertheless, our delegation will vote—again under reservation of the final vote—in favor of the Austro-Hungarian proposition which offers an easy means for clearing the way to the development of arbitration, in case the other project should not obtain a sufficient majority, a fact which the Mexican delegation would sincerely regret.

His Excellency Mr. **Milovan Milovanovitch** declares that, while inclined to vote in favor of the resolution, he prefers the articles which have previously obtained a majority in the committee, and does in no way desire to restrict the adhesion he has already manifested for the system of a Convention enumerating the cases that henceforth are to be submitted to obligatory arbitration. Mr. MILOVANOVITCH thinks that the resolution could be useful only in case the principle of a list even now established were not to secure a sufficient majority.

His Excellency Mr. **Luis M. Drago** declares that he will vote in the sense just indicated by Mr. MILOVANOVITCH.

His Excellency Baron **Guillaume** expresses himself as follows:

Recently the Belgian delegation stated that it did not believe it possible to foresee whether the interpretation or the application of any treaty whatever might not in definite circumstances give rise to questions of such a nature as would involve the security or the sovereignty of the States.

Impelled by thoughts of conciliation and by its sympathetic views with regard to the principle of obligatory arbitration, the Government of the king, our august sovereign, does not decline to subject the question to a fresh examination.

Under these conditions and without entering into any engagement as regards the result of the studies that are to be carried on, the Belgian delegation is authorized to adhere to the resolution proposed by the delegation of Austria-Hungary.

His Excellency Mr. **Martens** declares that in view of the fact that the Russian delegation had already expressed its desire for an agreement upon certain cases of obligatory arbitration, determined within fixed and narrow limits, he can see in the proposed resolution nothing but an adjournment of the question, and, in consequence, he will abstain from voting.

Mr. **Georgios Streit** expresses himself as follows:

In order to allay the fears that might be entertained by some of the Powers with regard to the acceptance of obligatory arbitration without restriction or reservation—we have just heard it stated that such fears exist and they may be shared by other Powers at the moment of the final vote—I request permission *à propos* of the text presented by Mr. MÉREY, to take up once more a proposition which I had the honor of presenting as an amendment to the project of the Swiss delegation.

The addition to the Swiss project, which I had proposed in the name of the Hellenic delegation, had for its object that any restriction or reservation made by any one of the Powers with regard to the subjects for which it might declare its willingness to accept arbitration, may be availed of with regard to that Power by any other Power not having itself made any reservations or restrictions.

This proposition may be added to the text of any obligatory arbitration which is inspired by the fundamental idea of the Swiss project and provides for one-sided notifications to be made by the Powers, in order that a legal bond may be established between the Powers whose notifications agree as to the matters to be submitted to arbitration.

[544] This proposition, therefore, we believe, may be adapted to the project that we are discussing. It is, so to say, implicitly contained in any arbitra-

tion treaty, since it establishes only reciprocity. It may perhaps not be unprofitable to affirm expressly both the principle and reciprocity and to settle at the same time questions that might arise in case some Power had added restrictions or reservations to its notification with regard to the matters for which it accepts obligatory arbitration. The amendment seems even of such a nature as may widen the field of application of the new stipulations. For after the discussions that have taken place in the committee and disclosed the difficulties existing with regard to certain matters, it will perhaps prove necessary for some of the signatory States to make restrictions by notifying some of the categories in question. With the possibility expressly stated by the Hellenic proposition, of making such restrictions, we see the opportunity of extending the field of the application of arbitration, because there will be Powers that will accept with restrictions certain categories which they would not have accepted if it had not been made possible for them to make some restriction. And in such case, on the other hand, the position of the rest that, for these same matters, have accepted obligatory arbitration without any reservation whatever, is made more specific.

The same considerations are applicable to reservations. It is possible that there are Powers that might accept with reservation certain categories which they would absolutely reject if opportunity were not given them to make reservations. The addition will open the way even to them.

In general, the addition of the paragraph that we propose has for its object to permit those who desire to accept the categories of disputes mentioned *without reservations,* to do so among themselves—while at the same time facilitating an understanding, as far as possible, with the rest of the Powers; that is to say, provided there is harmony of views between two Powers one of which accepts obligatory arbitration without restrictions and reservations, and the other under certain restrictions or reservations.

Thus our proposition would seem to meet also difficulties and hesitations of a psychological nature such as might in practice arise from the Swiss formula. For those who might be inclined to take the first step by notifying certain categories for which they accept arbitration may hesitate by wondering what might happen if later others should make reservations or restrictions with regard to those same categories. The addition proposed by the Hellenic delegation would, it seems, remove all danger, and, hence, all hesitation. It facilitates a beginning in the application of the treaty by those who desire to notify without reservations.

As we have already seen, it will also facilitate the application of the principle of obligatory arbitration by those who desire to make restrictions and reservations; and we have seen that such restrictions or reservations will frequently become necessary for the one or for the other of the signatory States.

Thus, this addition might possibly and perhaps happily be combined with the very ingenious system which is before us by giving to it still greater elasticity, something that would perhaps not be found to be a defect in a world treaty, constituting the first step, by a general treaty, in the direction of obligatory arbitration.

Let me read the text of our amendment:

> Every restriction or reservation which any one of the signatory Powers may add with respect to matters regarding which it declares itself willing to

[545] accept arbitration, may be invoked against that Power by any other Power, even if the latter has not made any reservation or restriction with respect to the said matters in its notification.

His Excellency Mr. **Carlin:** I feel it my duty to withhold my vote from the Austro-Hungarian proposition. There will certainly be need to go back to it in case another system, introducing the obligation of arbitration upon a stricter basis, should not secure a unanimous vote. There is a second reason which persuades me to abstain from voting: my Government wonders if it is proper that the Conference should prescribe a definite period of time to independent and sovereign Governments.

The **President** desires, in a few words, to explain his vote. He does not believe that he can cast it in favor of the resolution of the Austro-Hungarian delegation. He believes that there would be an undeniable contradiction between the preceding votes and the vote which it is desired shall now be taken. With the greatest attention the PRESIDENT has listened to the opinions of those of the members of the committee who mean to cast their provisional vote in favor of the resolution. Still, he does not feel convinced. The essential part of the preceding votes consists in the legal bond which shall be henceforth established. The formulas which the committee has hitherto considered are doubtlessly varied, but they are all intended to establish the *vinculum juris* in the Convention itself. On the other hand, the legal bond does not exist in the resolution. If it is adopted there would be left only Article 16 of the Convention of 1899. It would retain a provision dating back eight years, a provision which is after all but a recommendation. The resolution would not form a part of the Convention of 1907 which it is hoped will be concluded and would only be directed to an exchange of views that subsequently and when deemed proper to do so, would take place between the Powers. We would have no engagement, no article containing a real obligation.

The PRESIDENT observes, moreover, that the resolution tends to exclude the possibility that the delegations, during the Conference itself, might make known their adhesion to the application of obligatory arbitration to certain matters; it contains, on the contrary, a sort of request not to permit them to adhere to it at this time.

For these reasons, the PRESIDENT believes that a favorable vote upon the resolution would be in contradiction with the propositions previously adopted by the committee.

His Excellency Mr. **Ruy Barbosa** states that the words of the PRESIDENT have convinced him, and, therefore, he withdraws the declaration he made but a little while ago.

His Excellency Sir **Edward Fry** entirely concurs in the views expressed by the PRESIDENT.

His Excellency Mr. **Luis M. Drago** explains that in case he were to cast a vote favorable to the proposition of his Excellency Mr. MÉREY, such vote would be only of a provisional character, in case the British proposition were not to be accepted.

His Excellency General **Porter** remarks that he would be unable to vote in favor of a resolution intended to take the place of the articles of the project of the United States of America already adopted by the committee of examination.

His Excellency Mr. **Mérey von Kapos-Mére** reminds the committee of the fact that he himself had voted in favor of some points of the Anglo-Portuguese list and that, nevertheless, he does not think that he has contradicted himself. The vote upon the list was merely for the purpose of finding out the attitude of the committee. But the result of this vote has proved unfavorable to the principle of the list. This principle having been excluded, his Excellency Mr.
[546] MÉREY believed it useful to prepare another issue. Therefore, the proposition seems to him neither contradictory nor illogical.

His Excellency Mr. **Asser** states that the Netherland delegation is in favor of obligatory arbitration and of the principle of the list. But in view of the votes cast, which make it impossible to hope for a near unanimity between the Powers with regard to the list, the delegation adheres to the proposition of Mr. MÉREY which may, perhaps, come near to being accepted unanimously.

His Excellency Mr. **Milovan Milovanovitch** once more dwells upon the provisional character of the proposition of Mr. MÉREY. He believes, moreover, that whatever the fate that may befall the latter, the votes already secured upon the Anglo-Portuguese proposition must likewise and first of all be submitted to the judgment of the First Commission, since these votes express the opinion of a majority of the committee of examination.

The **President** states that in his judgment the main difference between the British and the Austro-Hungarian propositions does not consist in the existence or non-existence of a list, but rather in the existence or in the non-existence of a *legal bond*. The British proposition formulates a protocol which forms a part of the Convention itself and is open forthwith to all the Powers; on the other hand, the Austro-Hungarian proposition does not establish any *real* legal bond whatever: it is but a recommendation for the future.

His Excellency Count **Tornielli** states that the favorable vote which he means to give to the Austro-Hungarian proposition will not prevent him from voting likewise favorably upon other propositions that might be submitted to the committee if the Austro-Hungarian proposition should not secure a quasi-unanimity of votes necessary for its adoption.

The **President** has special record made of the declaration of his Excellency Count TORNIELLI.

The PRESIDENT consults the committee with regard to the proposition of Mr. MÉREY.

Voting for, 8: The Netherlands, Germany, Italy, Serbia, Mexico, Greece, Austria-Hungary and Belgium.

Voting against, 5: Great Britain, United States of America, Brazil, Portugal and France.

Abstaining, 4: Argentine Republic, Norway, Switzerland, Russia.

Absent, 1: Sweden.

His Excellency Count **Tornielli** states that in the preceding meeting he has had the honor of calling the attention of the committee to the essential points of a conciliatory proposition. The two opinions that have asserted themselves in the committee have had their expression in the votes upon the British proposition which received ten votes of the eighteen States represented in the committee, and upon the Austro-Hungarian proposition which received eight votes. He believes that neither the one nor the other of these two propositions has secured

a sufficient number of votes to permit it to be regarded as finally accepted.
[547] In consequence, he presents the phraseology of the conciliatory proposition which he reads aloud, and he requests that this proposition [1] be printed and distributed in order that it may also be brought up for discussion:

> The signatory Powers state that the principle of obligatory arbitration is applicable to disputes which have not been settled through diplomatic channels and which concern questions of a legal nature, more especially questions as to the interpretation or application of international conventions.
>
> Consequently they engage to study most carefully and as soon as possible the question of the application of obligatory arbitration. Such study must be completed by December 31, 1908, at which time, or even earlier, the Powers represented at the Second Hague Conference will notify each other reciprocally, through the Royal Netherland Government, of the matters which they are ready to include in a stipulation concerning obligatory arbitration.

Mr. **Eyre Crowe** calls attention to the fact that the Austro-Hungarian proposition, voted for by several members of the committee in the sole hope that it might secure an almost unanimous vote, has in reality obtained only a smaller majority than the British proposition.

The latter secured ten votes against five, whilst the resolution of Mr. Mérey obtained only eight votes against five.

The **President** asks to be advised by the committee. Shall the examination of the propositions of Great Britain and the United States of America, etc., be regarded as concluded, or is it deemed best to consider them further?

An exchange of views takes place with regard to this matter. Whilst their Excellencies Messrs. **Ruy Barbosa** and **Luis M. Drago** call for an immediate second reading and reference to the Commission of the texts adopted, their Excellencies Baron **Marschall von Bieberstein,** Mr. **Milovan Milovanovitch** and Sir **Edward Fry** believe that whereas all the votes have been but provisional, it is proper to proceed with a further discussion of the different propositions which have been submitted.

His Excellency Mr. **Ruy Barbosa** states that in his opinion, in view of the fact that no conclusive majority has as yet been secured, it would be well in order to waste no time and to extricate themselves from the deadlock which they had come to, to refer the matter immediately to the Commission.

His Excellency Baron **Marschall von Bieberstein** views the matter in the following light:

Two propositions have been discussed and then brought to a vote in the committee.

The British proposition has obtained a majority. The Austro-Hungarian proposition also has secured a majority; but several members of the latter majority declared that they voted in the affirmative only provided that the British proposition were not finally to obtain a large enough majority.

Count Tornielli has, in turn, submitted a proposition aiming to conciliate the varying opinions; we cannot refuse to discuss this proposition as soon as it shall have been printed and distributed.

Baron Marschall concludes by saying that the British proposition should, therefore, be further discussed.

[1] Annex 43.

Mr. **Georgios Streit** asks that the amendment of the Hellenic delegation be regarded as germane to the proposition of Count TORNIELLI and that it be discussed in connection with that proposition.[1]

[548] His Excellency Sir **Edward Fry** calls for a vote upon Articles 6-8 of the proposition of the United States of America.[2]

The **President** reads these articles aloud:

ARTICLE 6

The provisions of Article 3 can in no case be relied upon when the question concerns the interpretation or application of extraterritorial rights.

ARTICLE 7

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

The ratification of each signatory Power shall specify the cases enumerated in Article 3 wherein the ratifying Power will not avail itself of the provisions of Article 2; and it shall specify also with which one of the other Powers the agreement provided by Article 3 is made with regard to each of the cases specified.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all of the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications including additional cases enumerated in Article 3.

ARTICLE 8

Each of the signatory Powers shall have the right to denounce the Convention. This denunciation may involve either the total withdrawal of the denouncing Power from the Convention or the withdrawal with regard to a single Power designated by the denouncing Power.

This denunciation may also be made with regard to one or several of the cases enumerated in Article 3.

The Convention shall continue to exist to the extent to which it has not been denounced.

The denunciation, whether in whole or in part, shall not take effect until six months after notification thereof in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

These articles are adopted without discussion.

The committee then proceeds to the discussion of the proposition of General PORTER relative to the restrictive use of armed force for the recovery of contract debts.[3]

His Excellency General **Porter:** In accepting the program of the Conference, the Government of the United States of America, moved by the hope that wars which have a purely pecuniary origin might be avoided, has expressly reserved to itself the right to propose some limitation in the use of force for the recovery of contract debts. The proposition at present under consideration has been presented in conformity with this reservation, and, in consequence, it has been limited to the recovery of contract debts in such a way as

[549] to keep it strictly within the range of subjects to be taken under consideration by the Conference.

[1] Annex 36.
[2] Annex 37.
[3] Annex 59.

The aim of the proposition is not, directly or implicitly, to endeavor to justify in the case of debts or claims of any nature whatever any procedure which is not based upon the principle of the settlement of international differences by arbitration, of which, in its widest application, the United States is to-day more than ever the sincere advocate.

His Excellency Count **Tornielli**: The proposition of the United States of North America which comes again before us, considerably amended, could not have been accepted by the Italian delegation save under certain reservations. In the meeting of July 27, of the first subcommission of the First Commission, I had the honor to explain to you the reasons for these reservations. I stated at the time that it would depend on the replies to which my observations might give rise, whether the Italian delegation might also, as it desired to do, accept without reservations the proposition of the United States.

The information that we then called for has now been furnished us, and I hasten to state that we greatly appreciate its value. The declaration of his Excellency General Horace Porter, properly interpreted, means that the engagement which a State contracts in accepting the obligation to have recourse to arbitration before resorting to coercive means with regard to disputes that have a purely pecuniary origin and arise from contract debts, will in no way whatever tend to lessen, as concerns the other questions of a legal nature that cannot be settled through diplomacy, the efficiency of the general principle of arbitration recognized by the signatory Powers of the Convention of July 29, 1899, or by the Powers adhering to that international act.

The main purpose of the reservations formulated by the Italian delegation having thus been attained, I am happy to be able now to withdraw those reservations and to give our adhesion to the new text of the proposition of the United States of North America.

His Excellency Mr. **Milovan Milovanovitch** puts some questions to the authors of the proposition.

He desires to know, in the first place, the exact meaning of the words "contract debts." This rather vague expression may include debts arising from conventions concluded between a State and the nationals of another State, and also debts arising from contracts between one State and another State. Another and even more important question is to find out if the public debts of the States are also included under the denomination of contract debts. For this reason he states that the courts are never competent to take action with regard to the obligations of the States arising from public debts, whilst their competence frequently extends to contract debts of the States, in the strictest sense. And with more reason than in the case of controversies regarding the interpretation of conventions, it would be indeed necessary to take this competence into account. By the words "contract debts," do the authors of the proposition mean to refer to all these categories of debts, or to which ones of them? There must be no misunderstanding with regard to this matter.

Mr. Milovanovitch, on the other hand, believes that there would be a great advantage in omitting reference to armed force in paragraph 1 of the proposition. This resort to armed force is always understood in the [550] hypothetical case that a State should, for instance, refuse to carry out an arbitral decision—but should it *expressis verbis* be put in the proposition?

His Excellency General **Porter** replies that the distinction between debts existing between States and debts arising between a State and the nationals of another State is of little importance in this matter.

If we are considering public debts such as an emission of bonds, the creditors will be adequately protected by the general principles of the law of nations.

If, on the contrary, we are considering contract debts, the protection of the rights of the creditors will be assured by the proposition of the United States of America.

As regards the words "employment of armed force," he states that it is impossible to omit them, but that he should greatly desire that it be thoroughly understood that this extreme means is reserved for the case of refusal to carry out an arbitral decision.

His Excellency Mr. **Nelidow** having suggested the expression "coercive means," his Excellency General **Porter** replies that personally he should have preferred these words, but that, from what he has been given to understand, certain jurists had already objected because these words lend themselves to ambiguity.

His Excellency Baron **Marschall von Bieberstein** declares that the German delegation supports, under reservation, the proposition of the United States of America.

His Excellency Mr. **Luis M. Drago:** I believe that the expression "contract debts" is too vague, in itself, and might lead to possible misunderstandings and to discussions which, in advance, might well be foreseen and avoided in the phraseology of a treaty.

Are debts that arise from State loans included in this expression? At first sight it would appear that they are not. We may plainly distinguish two different aspects under which the State obligates itself within the field of law. On the one hand, we know that the State is a juridical or a moral person, an entity that acts in private law exactly as do municipalities, joint-stock companies, or any other corporations which may have been duly recognized by the laws. In contracts of private law (supplies, public works, etc.,) the State proceeds exactly like a private individual, by entering into engagements with another well-defined person who is its cocontractant. Its rights and its obligations are in this sense controlled by the provisions of the common law, and, if necessary, it will consent to being hailed before its own courts which will apply the rules of the common law exactly as they would in a litigation between private individuals.

The course of action is different when State loans are involved. There can be not the slightest doubt but that State loans are legal acts, but of a very special nature as cannot be confused with any other kind. The common civil law does not apply to them. Emitted by an act of sovereignty such as no private individual can exercise, they represent in no case an engagement between definite persons. For they stipulate in general terms that certain payments shall be made, at a certain date, to the bearer who is always an indeterminate person. The lender, on his part, does not advance his money as he does in loan contracts; he confines himself to buying a bond in the open market; there is no certified individual act nor any relation with the debtor Government. In ordinary contracts the Government proceeds in virtue of rights which are inherent in

[551] the juridical person or administrative corporation, by exercising that which is called the *jus gestionis* or the right with which the representative or administrator of any joint-stock company whatever is invested.

In the second case it proceeds *jure imperii,* in its quality as sovereign, by effecting acts which only the public person of the State as such could accomplish. In the first case we understand that the Government may be summoned before the tribunals or courts of claims, as happens day by day, so that it may make answer with regard to its engagements in private law; we could not conceive in the second case that the exercise of sovereignty might be questioned before an ordinary tribunal. It would at least be necessary to establish this distinction of a practical nature, to which I permitted myself to refer in the plenary Commission; for ordinary contracts, courts are available; there are no courts available to sit in judgment upon public loans.

If, on the other hand, it were said that national loans really imply a contract as is entered into with regard to ordinary loans, in the sense that they create exact obligations on the part of the borrowing State, it might be answered generally that it is not contracts alone that give rise to obligations; but that, even if it were so, it would be necessary to admit that they are a very special class of contracts with well-marked differential signs which, by that very fact, deserve to be put in a class by themselves.

As regards the mention of force which the delegation of the United States of America thought had to be retained in the new phraseology of its project, I still believe that it would be particularly dangerous to insist upon its retention. The words authorizing the use "of the armed force" go much farther than the simple retorsion or that which has been called a "naval demonstration."

Now it would be well to ask to what extent this sort of coercive measures would be resorted to. According to JOHN BASSETT MOORE, the eminent American jurist, Secretary of State BLAINE, who was, in 1881, giving his attention to the recovery of certain debts from Venezuela, proposed to the French Government that the United States of America should take possession of the customs offices of the South American Republic at La Guayra and at Puerto Cabello, and place there one of its agents charged with collecting the dues which would subsequently be distributed *pro rata* among the various creditors, and at the same time charge an additional tenth of one per cent to the account of the debtor State. These same methods of recovery were subsequently advocated by Secretary of State Frelinghuysen.

This is one way of understanding the application of coercive measures that might lead to controversies and even to conflicts. Should European or American nations be indistinctly authorized to administer in that way the customs of a debtor State, or, on the contrary, should we follow the system of Blaine and of Frelinghuysen, according to which this function would be solely entrusted to the United States? I merely put the question before you in order to show how difficult it is to define the use of force, and how preferable it would be to leave each case to be settled according to the circumstances and the necessities of the moment. But I must confine myself merely to giving a few indications, since for all hypothetical cases, my country has excluded forced recovery in case public debts are involved, the only kind of debts that may give rise to dangerous divergences of views.

The Argentine delegation finds itself, therefore, compelled to retain

integrally the two reservations which it has already made, while at the same time it confirms its vote in favor of the proposition of the United States of America.

[552] His Excellency Mr. **Carlin**: In the meetings of the First Commission, first subcommission, of July 18 and 27, the Swiss delegation has already had occasion to pay tribute to the highly humanitarian spirit and tendency which prompted the proposition of the United States of America. But it has at the same time explained the reasons for its not being able to favor it.

The cases of conflicts viewed in the proposition of the United States of America do not have their direct origin between States, but arise from private claims of individual parties. By their very nature, these claims are submitted to the jurisdiction of the requested State and to this jurisdiction only. But the Swiss courts offer to foreigners the same guaranties of impartiality that they vouchsafe their nationals. The Confederation can, therefore, not approve of a proposition that might result in invalidating decisions of the national courts upon matters of private law coming exclusively within their jurisdiction by deferring them to an arbitral court.

His Excellency Baron **Guillaume**: The proposition of the delegation of the United States of America aims to decrease, to avoid, if possible, the use of force in matters of conflict arising from contract debts.

It places force at the service of right.

The Belgian delegation cannot but express a full and complete sympathy for such conceptions.

But one may wonder if these conflicts had in view by the American amendment might not in certain circumstances affect the vital interests of the States, so that recourse to arbitration would be regarded by certain Governments as little to be desired.

And as one may furthermore wonder if the fixation of the time, the mode of payment and the guaranties to be given for the payment, come within the field of arbitration.

Therefore the Belgian delegation declares that it will abstain from voting upon the proposition.

His Excellency Mr. **Martens** wonders if it is indeed the thought of the authors of the proposition to confine the application thereof to cases in which the citizens of one State, being the creditors of another State, address themselves to their Government for the purpose of securing the amount which is due them. Is it well understood that on the interested Government depends absolutely the right to intervene in this conflict between its nationals and the foreign State in case of need, and even of substituting itself in their place with regard to the latter?

His Excellency General **Porter** replies in the affirmative.

His Excellency Mr. **Martens** takes note of this reply.

His Excellency Mr. **Milovan Milovanovitch** asks further if, in order to avoid all misunderstandings, there might not be added some words in the proposition at paragraph 1, reading as follows: " . . . arising from public debts or other contract debts."

His Excellency General **Porter** states that it is not within his competence to enter here into definitions which it will be almost impossible to formulate.

His Excellency Sir **Edward Fry** believes that the words " coercive means "

might lend themselves to ambiguity; they are used in the domestic law to designate all modes of execution used for national judgments.

The **President** declares that the French delegation will cast its vote in favor of the proposition—and he adds: especially because we behold in it a case of obligatory arbitration.

[553] His Excellency Baron **Marschall von Bieberstein** does not concur in this opinion.

His Excellency Mr. **Nelidow** declares in the name of the Russian delegation that to-day, as on the first day, he is inclined to vote in favor of the proposition of the United States of America.

Mr. **Georgios Streit** declares that he will abstain from voting upon the proposition.

The proposition of the United States of America, relative to contract debts is adopted by twelve votes against one.

Voting for: Germany, Great Britain, United States of America, Argentine Republic, Italy, Serbia, Mexico, Brazil, Portugal, Austria-Hungary, Russia, France.

Voting against: Switzerland.

The meeting closes at 4:45 o'clock.

[554]

SIXTEENTH MEETING

SEPTEMBER 4, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4:30 o'clock.

The **President** asks if the minutes of the thirteenth meeting do not suggest any remarks.

His Excellency Mr. **Carlin:** I ask to speak with regard to the minutes of August 29 which have just been distributed among us. I have a twofold observation to make, save the corrections of texts which I am going to hand to the secretariat. In the sitting of August 29, our colleague Mr. LANGE made a declaration similar to that of his Excellency Count TORNIELLI, to wit, that in voting against the Swiss proposition he did not mean to put it off as a subsidiary proposition. This remark does not appear in the minutes, and, in agreement with Mr. LANGE, I have the honor to ask that it be recorded.

The second observation I wish to make refers to the result of the vote upon the Swiss proposition. According to the terms of the minutes, it would seem that it had been defeated by ten votes against four: It should show, however, that the vote was ten against five, and that Switzerland must be added to the vote of the countries that accept it. It is self-evident that I voted for my own proposition.

The program of the day calls for the discussion of the Italian proposition [1] and of the amendment proposed by the Hellenic delegation.[2]

His Excellency Count **Tornielli:** On August 31 I had the honor to inform you that the preferences of the Italian delegation were given to a project that would have contained two things. The first of these two things is the formal record that unanimity of the Powers is secured for the application of obligatory arbitration in litigations concerning matters of a legal nature, and, in the first place, in the matters of interpretation or application of international conventions.

It is a statement which the Conference is now happily in position to make, and you will permit me to tell you candidly that Italy would fail of consistency if she did not call your attention to the great importance and the value of such a statement, which could not be made in 1899.

[555] The second matter which ought to be included in the project for which I have indicated to you my preference, is the engagement of the Powers mutually to notify each other within a definite period of time of the subjects that they are ready to submit to arbitration without reservations.

Formulated within two points clearly specified, which you will find inserted

[1] Annex 43.
[2] Annex 36. See Annex to the minutes of the thirteenth meeting of committee A.

in the minutes of our meeting of August 31, these two lines of thought have had their more precise expression in the phraseology of a draft Article 16 to be substituted for the article bearing the same number in the Regulation of 1899.

If you will permit me to do so, I shall, when the proper moment shall have been reached, explain to you in detail what this proposition contains and also the reasons for the matters not contained in it. I hope that from this you will come to think that it has some points of such a nature as will commend it to your kind attention.

But this day I shall confine myself to remarking that in the meeting of yesterday, the committee has been able to realize that the two propositions that confronted one another, one of which I would call the Anglo-American, and the other of which I would designate by the name of the Austro-Hungarian proposition, have neither of them secured a number of votes approaching a quasi-unanimity. It is possible that this division in the votes may not continue when, instead of eighteen States, forty-seven shall be called upon to vote. Both of these propositions may have chances of securing that quasi-unanimity of votes which is necessary to give a sufficient moral authority to a deliberation. As for myself, I believe that the authors of these propositions may very legitimately claim that the vote of the plenary Commission must decide between the two.

It is evident that if their expectations are realized, if one of the two obtains the quasi-unanimity of votes upon which it counts, the question will be settled. But if, on the contrary, neither the one nor the other of the two propositions secures a decisive vote, I request that before stating that the Conference has been unable to accomplish anything for arbitration, the Italian proposition be given consideration, and then, then only I shall request the Commission to adopt it.

As for the proposition of the Italian delegation, I have, therefore, the honor to ask you for an adjournment of the discussion and of the vote until such time when the plenary Commission shall have voted upon the propositions that have been before us up to the present time. The intermediate character of our proposition authorizes us, I believe, in making this request.

Mr. **Georgios Streit** requests that the amendment of the Hellenic delegation, which may be associated also with the proposition of the Italian delegation, be discussed later in the plenary Commission.

The **President** has special record made of the declarations of his Excellency Count Tornielli and Mr. Georgios Streit, and states that their desire will be followed.

He believes that, under these conditions, it will be necessary to pass immediately to a second reading of the texts already discussed and previously put to a vote.

His Excellency Mr. **Carlin** desires to observe that the fact that the proposition of the Swiss delegation has been rejected in these very special circumstances, will not prevent him, if necessary, from bringing it up in the Commission.

The committee resumes consideration, one by one, of the texts already adopted at the first reading.[1]

[556] The **President** reads aloud Article 16 of the British proposition.[2]

His Excellency Sir **Edward Fry** believes that Article 16 of the Conven-

[1] See fourteenth meeting, annex B.
[2] Annex 39.

tion of 1899[1] is the corner-stone of arbitration and insists that this article be not modified. As regards Article 16 proposed by the British delegation, it might form the object of a new article. The old Article 16 would be directed to general arbitration, the new Article 17 would refer only to obligatory arbitration.

His Excellency Mr. **Mérey von Kapos-Mére** reminds the members of the committee of the fact that at the time of the first reading, he deposited an amendment to Article 16 of the Convention of 1899, which he takes the liberty of calling to the attention of the committee. He believes that the British delegation which desires the retention of the old article, might readily accept it.

The committee adopts without remarks the retention of the old Article 16 and the new paragraph proposed by the Austro-Hungarian delegation, reading as follows:

> Consequently, it would be desirable that in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.

The text of the new British Article 16 is then put to vote.

ARTICLE 16

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests, or independence, or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

Voting for, 14: The Netherlands, Great Britain, United States of America, Argentine Republic, Italy, Serbia, Mexico, Brazil, Switzerland, Portugal, Sweden, Norway, Russia and France. *Voting against,* 2: Germany, Austria-Hungary. *Abstaining,* 2: Belgium, Greece.

Article 16 *a* is then put to a vote.

ARTICLE 16 *a*

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such
[557] a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

Voting for, 14: Great Britain, the Netherlands, Argentine Republic United States of America, Italy, Brazil, Serbia, Switzerland, Mexico, Portugal, Sweden, Norway, Russia and France. *Voting against,* 2: Germany, Austria-Hungary. *Abstaining,* 2: Belgium and Greece.

Article 16 *b* is then taken up.

ARTICLE 16 *b*

The high contracting Parties recognize that certain disputes provided for in Article 16 are susceptible of being submitted to arbitration without reservation.

[1] In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

The **President** believes that the committee must make a choice between this Article 16 and Article 3 of the proposition of the United States of America which reads as follows:

ARTICLE 3

Each of the signatory Powers agrees not to avail themselves of the provisions of the preceding article in such of the following cases as shall be enumerated in its ratification of this Convention, and which shall also be enumerated in the ratifications of every other Power with which differences may arise; and each of the signatory Powers may extend this agreement to any or all cases named in its ratification to all other signatory Powers or may limit it to those which it may specify in its ratification.

1. Disputes concerning the interpretation of treaty provisions relating to . . . etc., etc.

His Excellency General **Porter** states that his instructions forbid him to vote in favor of the British Article 16 *b* without an addition relative to ratification.

His Excellency Sir **Edward Fry** declares that Article 3 of the proposition of the United States of America gives to the signatory Powers the right to indicate not only the cases for which they will accept obligatory arbitration without reservation, but the Powers with which they would care to assume obligations. He believes that this provision is in contradiction with the idea of a world arbitration treaty and that he cannot accept it.

His Excellency Mr. **Hammarskjöld** suggests, in order to give greater clearness to Article 16 *b*, to replace the words "without reservation" with the phrase: "without the reservations mentioned in Article 16."

Mr. **Eyre Crowe** declares that the only reservations admitted are those indicated in Article 16.

[558] The amendment of his Excellency Mr. HAMMARSKJÖLD seems, therefore, useless, but he does not object to the addition of the words proposed.

The **President** is of the opinion that the British Article 16 *b* and the American Article 3 contain three ideas.

The first is the enunciation of the principle itself of obligatory arbitration, the second that the engagement shall be assumed by the Powers only on the day of the exchange of the ratifications. On these two points Sir EDWARD FRY is in agreement with the authors of the proposition of the United States of America. Finally, Article 3 contains, in the third place, a provision in virtue of which each Power might specify the States with which it might mean to enter into obligations. Upon this last question there is a divergence of views.

Mr. **Georgios Streit** observes that Article 3 of the proposition of the United States of America should preferably be discussed at the same time as the British Article 16 *d*, with which it is closely related.

The **President** admits the correctness of the remark of Mr. GEORGIOS STREIT; nevertheless, and in order not to change the order of the articles which are now being put to a vote, he brings the first two points to which he has referred to an immediate vote.

Voting for their adoption, 13: The Netherlands, Great Britain, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway, Russia, France and Argentine Republic.

Voting against, 4: Germany, Austria-Hungary, Belgium, Greece.

Abstaining, 1: Switzerland.

The third point (right to limit the number of States with which one assumes obligations) is declined by eight votes: Great Britain, Argentine Republic, Serbia, Portugal, Sweden, Norway, Belgium and France, against seven: The Netherlands, United States of America, Italy, Mexico, Brazil, Switzerland and Russia.

The **President** believes that it will be necessary to secure from outside the committee a phraseology that will harmonize the two texts of the propositions of the United States of America and of Great Britain. The agreement is complete upon the first two points that have just been put to a vote; it will now be necessary to come to an understanding with regard to one phraseology.

Their Excellencies Mr. **Nelidow** and Sir **Edward Fry** think that this presents more than a mere matter of form; a question of principle is involved.

Mr. **James Brown Scott** feels that there is a misunderstanding; everybody is agreed upon the first two points brought to a vote. It would be well at present to substitute only the American Article 3 for the British Article 16 *b*. As for the choice of the signatory Powers with regard to their cocontractants it is no longer necessary to take this matter into account in view of the fact that this stipulation has been rejected by the committee.

His Excellency Mr. **Hammarskjöld** expresses the opinion that in the American Article 3 it would also be necessary to omit the words:

> in such of the following cases as shall be enumerated in its ratification.[1]

Here we are no longer dealing with a choice; there will be a list, accepted or not accepted.

[559] The **President** feels that that it is simply a question of blending into one good text the two points adopted by the committee. Messrs. Crowe and Scott will be good enough to take charge of this matter.

ARTICLE 16 *c*

With this in mind they agree to submit to arbitration without reservation the following disputes:

1. Controversies concerning the interpretation and application of conventional stipulations relative to the following matters:

a .....
b .....
c .....
d .....

etc. etc. etc.

II .....
III .....

The **President:** This article can, of course, not exist unless we adopt a list. Therefore, to find out if this article is to be retained, we must vote again at the second reading, separately, upon the different items of the Portuguese, British, etc., lists. However, to hasten the end of our labors, I propose that we keep, henceforth, to the items which have already secured a majority. We shall take them up one by one and finally vote upon the whole.

His Excellency Mr. **Mérey von Kapos-Mére** states that, in his judgment, it would be an error to say that a list of cases has already secured an absolute

[1] Annex 37.

majority. He recalls the remark of Count TORNIELLI, who called attention to the fact that in a preceding meeting the majority of eleven secured for some of the items was wanting in homogeneousness. On the other hand, he states that several affirmative votes were cast on the condition that a unanimity or a quasi-unanimity were secured in the committee. This has, however, not been the case. The previous affirmative votes are, therefore, rendered null and void, and he shall cast a negative vote upon the list that is presented.

His Excellency Mr. **Hammarskjöld** is of the opinion that a new vote upon the items that have received a relative majority is the more necessary because several delegations abstained only for want of instructions. They may have since that time received further instructions.

His Excellency Mr. **Martens** reminds the committee of the fact that the British proposition is based upon the idea that it is possible to accept obligatory arbitration for some definite cases, and proposes to leave it to the PRESIDENT to see to the drafting of a list which should be composed of the items that might seem to him the most acceptable.

The **President** does not feel that he ought to assume this delicate task, unless by a unanimous consent the members of the committee entrust it to him; but he believes that in putting to a vote the items that, at the first reading, secured the largest majority, an identical result would be obtained.

His Excellency Count **Tornielli** proposes that, in the indication of the result of the votes which are going to be taken upon the various items of the
[360] lists, the secretariat state the names of the different delegations in order to see if there is homogeneousness in the votes.

The **President** states that it is so ordered.

After an exchange of views upon the manner of voting, in which their Excellencies Messrs. **Nelidow, Ruy Barbosa, Asser,** Marquis **de Soveral** and the **President** take part, it is decided that a vote shall be taken upon all the articles that have already been put to a vote at the first reading, and that the votes of the different delegations shall be recorded.

Voting is proceeded with regarding the cases included in the table of the "texts adopted"[1] in the order of importance of the number of favorable votes obtained for each of them at the first reading.

His Excellency General **Porter** declares that he will vote in favor of the list with the reservation of Article 3 of the proposition of the United States of America already adopted.

No. 11. *Reciprocal free aid to the indigent sick.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary, Belgium.

Abstaining, 2: Russia and Switzerland.

No. 6. *International protection of workmen.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

[1] See fourteenth meeting, annex A.

Abstaining, 2: Russia and Switzerland.

No. 7. *Means of preventing collisions at sea.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

[561] No. 10 *b*. *Weights and measures.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

No. 2. *Measurement of vessels.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

B. (Article 16 a). Pecuniary claims for damages when the principle of indemnity is recognized by the parties.

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Portugal, Sweden, Norway, Russia and France.

Voting against, 5: Germany, Greece, Austria-Hungary, Belgium and Brazil.

Abstaining, 1: Switzerland.

No. 3. *Wages and estates of deceased seamen.*

Voting for, 12: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway and France.

Voting against, 4: Germany, Great Britain, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

[562] No. 4. *Equality of foreigners and nationals as to taxes and imposts.*

Voting for, 9: The Netherlands, Great Britain, Italy, Serbia, Mexico, Portugal, Sweden, Norway and France.

Voting against, 6: Germany, Argentine Republic, Greece, Brazil, Austria-Hungary and Belgium.

Abstaining, 3: United States of America, Russia and Switzerland.

No. 1. *Customs tariffs.*

Voting for, 9: The Netherlands, Great Britain, Serbia, Italy, Mexico, Portugal, Sweden, Norway and France.

Voting against, 6: Germany, Argentine Republic, Greece, Brazil, Austria-Hungary and Belgium.

Abstaining, 3: United States of America, Russia and Switzerland.

No. 14. *Private international law.*

Voting for, 7: The Netherlands, Great Britain, Serbia, Portugal, Norway, Russia and France.

Voting against, 7: Germany, Argentine Republic, Greece, Brazil, Mexico, Austria-Hungary and Belgium.

Abstaining, 4: United States of America, Italy, Sweden and Switzerland.

No. 8. *Protection of literary and artistic works.*

Voting for, 10: The Netherlands, Great Britain, Argentine Republic, United States of America, Serbia, Mexico, Brazil, Portugal, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

Abstaining, 4: Italy, Switzerland, Sweden and Russia.

[563] No. 9. *Regulation of commercial and industrial companies.*

Voting for, 9: The Netherlands, Great Britain, United States of America, Serbia, Portugal, Sweden, Norway, Russia and France.

Voting against, 5: Germany, Argentine Republic, Greece, Austria-Hungary and Belgium.

Abstaining, 4: Italy, Mexico, Brazil and Switzerland.

No. 10 *a. Monetary systems.*

Voting for, 8: The Netherlands, Great Britain, Serbia, Mexico, Portugal, Sweden, Norway and France.

Voting against, 8: Germany, United States of America, Argentine Republic, Italy, Greece, Brazil, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

No. 5. *Right of foreigners to acquire and hold property.*

Voting for, 8: The Netherlands, Great Britain, United States of America, Italy, Serbia, Portugal, Norway and France.

Voting against, 8: Germany, Argentine Republic, Greece, Mexico, Brazil, Sweden, Austria-Hungary and Belgium.

Abstaining, 2: Russia and Switzerland.

No. 2 (*of the Swedish proposition, Article 18*). *In case of pecuniary claims involving the interpretation or application of conventions of every kind between the parties in dispute.*

Voting for, 8: The Netherlands, Argentine Republic, Italy, Serbia, Portugal, Sweden, Norway and France.

Voting against, 6: Germany, Great Britain, Greece, Brazil, Austria-Hungary and Belgium.

Abstaining, 4: The United States, Mexico, Russia and Switzerland.

[564] No. 15. *Civil and commercial procedure.*

Voting for, 8: The Netherlands, Great Britain, Serbia, Portugal, Sweden, Norway, Russia and France.

Voting against, 5: Germany, Argentine Republic, Greece, Austria-Hungary and Belgium.

Abstaining, 5: Brazil, the United States of America, Italy, Mexico and Switzerland.

No. 12. *Sanitary regulations.*

Voting for, 9: The Netherlands, United States of America, Serbia, Brazil, Portugal, Mexico, Sweden, Norway and France.

Voting against, 6: Germany, Argentine Republic, Italy, Greece, Austria-Hungary and Belgium.

Abstaining, 3: Great Britain, Russia and Switzerland.

No. 13. *Regulations concerning epizooty, phylloxera, and other similar pestilences.*

Voting for, 9: The Netherlands, Great Britain, United States of America, Serbia, Brazil, Portugal, Sweden, Norway and France.

Voting against, 7: Germany, Argentine Republic, Italy, Greece, Switzerland, Austria-Hungary and Belgium.

Abstaining, 2: Mexico and Russia.

No. 2 (*of the Portuguese proposition, Article 16 b*). *Taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck.*

Voting for, 7: The Netherlands, Italy, Serbia, Portugal, Sweden, Norway and France.

Voting against, 7: Germany, Great Britain, Argentine Republic, Greece, Brazil, Austria-Hungary and Belgium.

[565] *Abstaining,* 4: United States of America, Mexico, Russia and Switzerland.

No. 13 *b* (*of the Portuguese proposition, Article 15 b*). *Conventions providing for repatriation.*

Voting for, 8: The Netherlands, Serbia, Italy, Mexico, Portugal, Sweden, Norway and France.

Voting against, 6: Germany, Great Britain, Argentine Republic, Greece, Austria-Hungary and Belgium.

Abstaining, 4: United States of America, Brazil, Russia and Switzerland.

No. 3 (*of the Swedish proposition, Article 18*). *In case of pecuniary claims arising from acts of war, civil war or the arrest of foreigners or the seizure of their property.*

Voting for, 9: Argentine Republic, France, Italy, Mexico, Norway, the Netherlands, Portugal, Serbia, Sweden.

Voting against, 5: Germany, Austria-Hungary, Belgium, Great Britain, Greece.

Abstaining, 4: Brazil, United States, Russia and Serbia.

Serbian proposition, Postal, telegraphic and telephonic conventions.

Voting for, 8: Argentine Republic, France, Italy, Norway, the Netherlands, Portugal, Serbia, Sweden.

Voting against, 5: Germany, Austria-Hungary, Belgium, Great Britain, Greece.

Abstaining, 5: Brazil, United States, Mexico, Russia, Switzerland.

The **President** proceeds with the recording of the cases and finds that of twenty-two cases submitted to a vote, eight of them have obtained an absolute majority (seven cases with twelve votes and one case with ten votes), ten others have received a simple majority.

His Excellency Mr. **Asser** observes that the Netherland delegation has voted all the numbers in the hypothesis that the preamble of the article shall be maintained as it was adopted upon the proposition of the subcommittee presided over by Mr. Guido Fusinato.

[566] His Excellency Mr. **Martens** explains why Russia abstained in a large number of cases: it is for the reason that she has no conventions relating to the most of the matters submitted to a vote. Under these conditions, her vote would have been without purpose. This is, in certain cases, the only reason for her abstaining from taking part in the voting.

Upon the request of several delegates, it is decided to draft a table of the votes of the committee and to distribute the same.

The **President** puts the whole of Article 16 *c* to a vote.

His Excellency General **Porter**, with regard to this article, makes the usual reservations of the American delegation concerning ratification.

The **President** has special record entered of these reservations.

Voting for, 13: The Netherlands, Great Britain, Argentine Republic, United States of America, Italy, Serbia, Mexico, Brazil, Portugal, Sweden, Norway, France and Russia.

Voting against, 5: Germany, Greece, Switzerland, Austria-Hungary and Belgium.

The article is adopted by thirteen votes against five.

Article 16 *d* is then read aloud.

ARTICLE 16 *d*

The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

1. Other subjects which seem to them at present capable of submission to arbitration without reserve.

2. The Powers which from now on contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

Mr. **Eyre Crowe**: In case the draft protocol should be adopted, it would be necessary to complete this article with a paragraph indicating the conditions in which the matters might be added.

His Excellency General **Porter**, with regard to this article, makes the usual reservations of the American delegation concerning ratification.

The **President** has special record made of these reservations and proceeds to the vote of Article 16 *d*.

Voting for, 13: The Netherlands, Great Britain, Italy, United States of America, Argentine Republic, Serbia, Mexico, Brazil, Portugal, Sweden, Norway, Russia and France.

Voting against, 4: Germany, Austria-Hungary, Belgium and Greece.

Abstaining, 1: Switzerland.

The article is adopted by thirteen votes against four, with one abstention.

[567] Article 16 *e* is then read aloud.

ARTICLE 16 *e*

It is understood that the conventional stipulations mentioned in Articles 16 *c* and 16 *d* shall be submitted to arbitration without reservation, so far as they refer to agreements which shall be executed directly by the Governments or by their administrative departments.

His Excellency Mr. **Milovan Milovanovitch**: Upon this same article, we have had also a proposal from the English delegation which had obtained seven votes against seven and, in consequence, had not been adopted.

I had on the occasion of this vote abstained from voting because the phraseology had not seemed clear to me.

Subsequent to the vote, I had an opportunity of discussing it with our colleagues from Great Britain who have accepted the following wording:

> It is understood that arbitral awards, in so far as they relate to questions coming within the jurisdiction of national courts, shall have merely an interpretative force, with no retroactive effect on prior decisions.

Under these conditions, I concur in the British proposition thus amended, and call for a new vote upon this matter.

His Excellency Mr. **Hammarskjöld** explains why he will not vote in favor of Article 16 *e*. In his opinion there ought not to exist any differences between the obligations to which a State is subject, on the pretext that they are performed by this or by that of its organs.

In agreement with what has been said by the delegate from Serbia, he believes that the phraseology of the FUSINATO subcommittee establishes an inequality between the countries, as some have an administration both stronger and more centralized than the rest. And he adds that the proposed article would open the door to most disagreeable international controversies concerning the attributions of the different organs of this or of that State.

Mr. **Guido Fusinato** does not wish to consider the matter in detail. Moreover, his personal sentiment favorable in principle to the thesis of his Excellency Mr. HAMMARSKJÖLD is known. He wishes merely to remark that the votes that have just been cast are subordinate, as concerns some delegations, to the vote upon this Article 16 *e*. If the Serbian amendment is adopted, the whole matter will be brought into question again.

His Excellency Mr. **Martens** has the same apprehensions as those expressed by his Excellency Mr. HAMMARSKJÖLD. He is surprised to find that arbitral decisions may only be carried out by certain organs of the States and not by certain others. The obligation is an obligation *in toto* and the only logical principle in the matter is to extend it to all the organs of the State.

His Excellency Baron **Marschall von Bieberstein**: This controversy reopens the entire discussion.

His Excellency Mr. **Asser** reiterates his previous declarations upon this matter. The point is to distinguish between conventions that must be carried out by the departments of the Government and those that must incorporate new provisions in the legislation. It is but natural for the State to secure a legislative interpretation of the convention, but in no case can it be held responsible for the decisions of its courts. This thesis has already been sanctioned by a vote.

[568] As regards the inequality to which reference has been made, it does not exist at all: The State really remains obligated through all its organs.

His Excellency Mr. **Milovanovitch** does not desire to discuss thoroughly this matter, in view of the fact that he has already stated all he cared to state upon the subject; he confines himself to recommending his amendment because he is firmly convinced that it will improve the whole Convention. It is the special purpose of the second reading to correct the imperfections of the project, and it may confirm or nullify that which had been decided upon at the first reading. If it is possible, nothing prevents our improving the Convention by again taking up a provision that may be criticized.

The **President** desires to explain his vote. In theory he is of the opinion of their Excellencies Messrs. MARTENS, HAMMARSKJÖLD and MILOVANOVITCH. But the question has already been discussed and settled in one sense: now, several members of the committee attach importance to this decision and have voted the totality and the detail of the texts that have been approved only because they presumed that this decision had been maintained. He will, therefore, vote in favor of retaining Article 16 *e* as worded by the subcommittee composed of

Mr. Guido Fusinato, his Excellency Mr. Mérey von Kapos-Mére and his Excellency Mr. Asser.

His Excellency Mr. **Mérey von Kapos-Mére** identifies himself with the text which he helped to draft, but which he deems it useless to vote upon, inasmuch as he does not accept the totality of the articles.

The **President** puts the Serbian amendment to Article 16 *e* to a vote.

Voting for, 7: Great Britain, Serbia, Portugal, United States, Sweden, Norway, Russia.

Voting against, 5: The Netherlands, Argentine Republic, Italy, Brazil, France.

Abstaining, 6: Germany, Austria-Hungary, Belgium, Greece, Switzerland and Mexico.

Their Excellencies Count **Tornielli**, Mr. **Asser** and Mr. **Ruy Barbosa** reserve their final votes upon the other articles in case the Serbian phraseology should be inserted in the convention.

The **President** has special record entered of these reservations.

He reads Article 16 *f* aloud.

Article 16 *f*

If all the signatory States of one of the conventions mentioned in Articles 16 *c* and 16 *d* are parties to a litigation concerning the interpretation of the Convention, the arbitral award shall have the same force as the Convention itself and shall be equally well observed.

If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time and they have the right to intervene in the suit.

The arbitral award shall be communicated to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the
[569] interpretation of the point in dispute adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the convention itself. In the contrary case, the judgment shall be valid only for the litigant parties.

His Excellency Mr. **Martens**: According to this phraseology, if the arbitral decision is unanimously accepted, it will be obligatory as between all the signatories of a convention. But if there is a single abstention, it will be obligatory only as between the two parties in dispute. Why should it not be admitted that it is valid *for all those who have accepted it?*

Mr. **Guido Fusinato** finds this objection entirely correct and, as for himself, is not opposed to having it complied with.

The **President** states that this opinion is shared by the committee. Addition, therefore, in that sense will be introduced in Article 16 *f*.

Article 16 *g* is then read aloud.

Article 16 *g*

The procedure to be followed in order to bring about adhesion to the principle established by the arbitral decision, in the case referred to in paragraph 3 of the preceding article shall be as follows:

If a convention establishing a union possessing a special bureau is involved, the parties that have taken part in the suit shall transmit the text of the decision to the special bureau through the medium of the State within whose territory the bureau has its headquarters. The bureau shall draft the text of the article of the convention conformably to the arbitral decision and communicate it through the same medium to the signatory Powers that have

not taken part in the suit. If the latter unanimously accept the text of the article, the bureau shall establish the assent by means of a protocol which, drafted in due form, shall be transmitted to all the signatory States.

States whose reply shall not have reached the bureau within a year from the date of the communication made by the bureau itself shall be considered to have given their consent.

If a convention establishing a union possessing a special bureau is not involved, the functions of the special bureau shall be exercised by the Hague International Bureau through the medium of the Government of the Netherlands.

It is well understood that the present convention does not in any way affect the arbitration clauses already contained in existing treaties.

Mr. **Eyre Crowe** observes that it would be preferable to detach the last paragraph in order to make of it a special article.

Mr. **Guido Fusinato** replies that the present form might be preserved, in replacing the word "*Convention*" by "*stipulation*" or "*provision.*"

Mr. **Eyre Crowe** calls attention to the fact that although Article 16 *f* of the British project (third text, dated August 26, 1907) has been adopted (without a vote) at the meeting of August 23, it does not appear in the text of all the Articles 16 to 16 *h* adopted by the committee.[1] Up to the present time, Mr. Crowe had not called attention to this absence, on the supposition that Article 16 *f* had been replaced with the last paragraph of the proposition of the committee presided over by Mr. Fusinato, and which had afterwards been adopted at the meeting of August 29. But from the explanations just given by Mr. Fusinato, it follows that the reservation contained in this paragraph relates, not to the entire convention, but only to Article 16 *g*. Under these conditions, it is
[570] necessary to retain Article 16 *f* of the British proposition which bears upon the whole project.

His Excellency Mr. **Carlin** is not opposed to the modification proposed by Mr. Guido Fusinato, but on condition that in Article 16 *f*[2] of the British proposition, the word "obligatory" is omitted. His Excellency Mr. Carlin calls attention to the fact that in the International Convention for the transportation of merchandise by rail there is a clause referring to optional arbitration. He clings to the belief that the Conference cannot, in a general convention, modify a previous special convention.

This proposition is adopted.

Mr. **Eyre Crowe** calls attention to the fact that the article of the English proposition relative to the rights and duties of extraterritoriality has been omitted.

The **President** states that it will be reestablished in the final text.

Article 16 *g* is adopted without any further remarks.

Article 16 *h* is then read aloud.

Article 16 *h*

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

[1] Annex B to the minutes of the fourteenth meeting of committee A.
[2] Annex 39.

His Excellency Count **Tornielli** makes a reservation with regard to Article 16 *h* which seems to exclude the possibility for the parties to have the *compromis* drafted by the judge himself.

Article 16 *h* is adopted without any further remark.

His Excellency Mr. **Hammarskjöld** takes up once more Article 16 *f* of the British proposition, and calls attention to the fact that no new provision may derogate from general treaties that are already concluded, treaties such as the treaty between Denmark and Italy. He criticizes, therefore, the expression " special conditions," which seems to express the contrary.

His Excellency Count **Tornielli** shares the opinion of Mr. HAMMARSKJÖLD.

It is decided that in wording the article these remarks be taken into account.

The **President** puts to a vote the whole of the texts adopted at the first and at the second readings [1] save the modifications that have been decided upon.

Voting for, 13: The Netherlands, Great Britain, United States of America, Argentine Republic, Italy, Serbia, Mexico, Brazil, Portugal, Russia, Sweden, Norway and France.

Voting against, 4: Germany, Greece, Austria-Hungary and Belgium.

Abstaining, 1: Switzerland.

The whole of the texts is adopted by 13 votes against 4, with 1 abstention.

[571] The **President** states that after sixteen meetings the committee A has come to the end of its task. This task has been long and frequently difficult, but the common good-will has made it agreeable and efficacious. The reporter, Baron GUILLAUME, will be good enough to begin to write his report and to submit it to the committee as soon as possible.

Mr. **Heinrich Lammasch** remarks that the modifications proposed to Article 27 of the Convention of 1899 come within the field of committee C. But the latter has dispossessed itself of the question which seems to it to have a political bearing, and has turned it over to committee A for its settlement. Moreover, Chile and Peru, the authors of the amendments to this matter, are not represented in committee C. Mr. LAMMASCH, therefore, requests that Article 27 be included in the program of the next meeting of committee A.

Mr. **James Brown Scott** calls attention to the fact that Articles 7 and 8 of the American proposition have been adopted at the first reading, and through an error have not been included in Annex A to the minutes of the fourteenth meeting.

It is decided that they shall be inserted in the final text submitted to the Commission.

The meeting closes at 6: 45 o'clock.

[1] See fourteenth meeting, annex B.

[572]

SEVENTEENTH MEETING

OCTOBER 1, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the fourteenth, fifteenth and sixteenth meetings are adopted without remarks.

The **President** asks of Mr. FUSINATO, who presided over committee C, if the minutes of the committee did not give rise to any remarks.

Upon the negative answer of Mr. **Guido Fusinato,** they are adopted by committee A.

The **President** calls the attention of the members of committee A to the fact that they have a last task to fulfill before going before the Commission: they must examine and enter record of the decisions reached by committee C which was constituted by committee A to study Part IV of the Convention of 1899.

In consequence, the numbers of each article of the new Part IV are checked up by adopting the text of the report of his Excellency Baron GUILLAUME, an extract of which has been distributed among the members of the committee.

ARTICLE 37 (former Article 15)

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

His Excellency Mr. **Hammarskjöld** reminds the members that according to the Swedish proposition, the former Articles 15 and 18, with a slight modification of the latter, were combined into one: they correspond to Articles 37 and 40 (new numbering). It would be well to enunciate the incontestable principle referred to in Article 40, the first time that arbitration comes to discussion.[1]

Mr. **Guido Fusinato**: This meeting was the intention of committee C. A desire to that effect had been expressed and it is easy to realize it.

[573] Mr. **Heinrich Lammasch**: Article 37 refers to arbitration in general. If the proposition of Mr. HAMMARSKJÖLD is accepted, it would be better to use the expression *"recourse to arbitration."* It has also been understood that the word *"State"* would be replaced by the word *"Power."*

The combination suggested by his Excellency Mr. HAMMARSKJÖLD, is adopted with the modifications indicated by Mr. HEINRICH LAMMASCH.

ARTICLE 38

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most

[1] Annex 22.

effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit. (*Adopted.*)

His Excellency Mr. **Hammarskjöld** reserves the right to have a conversation with the Reporter with regard to this article, in order to suggest to him a slight addition.

ARTICLE 39

The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

(*Adopted.*)

ARTICLE 40

The arbitration convention implies an engagement to submit in good faith to the arbitral award.

(*Adopted.*)

Article 40, according to what was decided as a result of the proposition of Mr. HAMMARSKJÖLD becomes Section 2 of Article 37.

Articles 41, 42, 43, 44, 45, 46, 47 and 48 are approved.

ARTICLE 41

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present act or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

ARTICLE 42

With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

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ARTICLE 43

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 44

The Permanent Court has its seat at The Hague.

An International Bureau serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the Bureau, as soon as possible, a duly certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

ARTICLE 45

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed, and for a fresh period of six years.

ARTICLE 46

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by agreement of the parties, the following course shall be pursued:

Each party appoints two arbitrators, of whom one only can be its *ressortissant* or chosen from among the persons selected by it as members of the Permanent Court. The arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

If within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court exclusive of the members selected by the litigant parties and not *ressortissants* of either of them. Which of the candidates thus presented shall be umpire is determined by lot.

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ARTICLE 47

The tribunal being composed as has been stated in the preceding article, the parties notify to the International Bureau as soon as possible their determination to have recourse to the Court, the text of the *compromis,* and the names of the arbitrators.

The Bureau likewise communicates without delay to each arbitrator the *compromis,* and the names of the other members of the tribunal.

The tribunal of arbitration assembles on the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the tribunal, in the performance of their duties, and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 48

The International Bureau is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers, or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

With regard to Article 46, his Excellency Baron **Guillaume** (reporter) calls attention to the fact that he has omitted a clause of his report, at the request of a delegate. He also calls attention to the fact that former Article 25, which should come after the new Article 47, has been suppressed.

These two omissions are approved.

ARTICLE 49

The signatory Powers consider it their duty if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

His Excellency Mr. **Carlos G. Candamo** upholds his proposition with regard to the former Article 27.[1]

The proposition which the Peruvian delegation has had the honor of presenting to the first subcommission on July 9 and which it subsequently developed in the meeting of July 27, tends to introduce the principle of a new system intended to facilitate voluntary recourse to arbitration. The Peruvian delegation is happy to realize that this principle has met with the assent and the support of various Powers, and, among others, of Chile which, accepting the general idea, has proposed an amendment which has for its object to modify the practical operation of this system. The Peruvian delegation believes, however, that this amendment considerably weakens the scope of its proposition.

In the first place, there is a point of which it is important to remind ourselves in order to avoid any and all misunderstanding. The procedure provided for by the Peruvian proposition refers only to an effort of voluntary arbitration; it is necessarily foreign to any obligatory arbitration case that might exist. Its clear and definite object is to create new facilities in order to induce the contending parties to have recourse to voluntary arbitration.

[576] Article 27 of the Convention of 1899 had established a first proceeding which might lead to arbitration.

In Article 27 *bis*, the Peruvian delegation desired to add a second one, to the effect that the parties themselves would come to manifest their good-will for recourse to arbitration.

This being so, it would seem that the amendment, proposed by Chile, tends without reason to restrict the Peruvian provision in its application.

In the first place, the Chilean amendment[2] restricts the application of the provision to cases in which the dispute should not relate to facts that occurred prior to the present Convention.

We do not see for what reasons voluntary arbitration should not be applicable to facts or to litigations that have arisen prior to the Convention. We might perhaps understand that it might be well to exclude the application of obligatory arbitration from cases in which the dispute is connected with facts that arose prior to the convention which regulates that arbitration. But, when we are dealing with voluntary arbitration, on what ground should the freedom of the conventions be restricted? Why impose an obstacle for coming to an understanding,

[1] Annex 15.
[2] Annex 16.

upon Powers that might have reached a conciliating agreement? Should then all effort to arbitrate be forbidden for the sole reason that the conflict might arise from causes anterior to the international Convention?

As regards the final part of Article 27 *bis*, the Peruvian delegation wishes to affirm that in its proposition the International Bureau is given no mission of a political or diplomatic nature. It must give neither counsel nor advice. It remains what it is: an intermediary. It confines its activities to receiving declarations and of communicating them to the other interested party, thus sparing the Powers in conflict the difficulties of a direct conversation which circumstances might often make impossible.

Into this final part of Article 27 *bis* the Chilean delegation introduces a provision consisting in the obligation, as regards the International Bureau, to notify to the signatory governments of the Hague Convention, the declaration which might have been addressed to it by one of the Powers, and the reply of the other. In this way it was desired to connect the provision of Article 27 *bis* with that of Article 27, and thus to furnish to the signatory Powers the means of exercising their conciliating action in so far as they might deem it proper to do so. The Peruvian delegation had thought that in those cases in which, according to the provisions of Article 27 *bis*, it was one of the Powers which of its own volition came to manifest before the International Bureau its good-will for resorting to arbitration and sought a basis for an understanding, it would be better to leave it to the two Powers in dispute to settle their difference between themselves, that thus they would have a better opportunity to come to an understanding.

However that may be, and notwithstanding the considerations just stated, the Peruvian delegation is quite inclined to accept the modifications which the committee might deem it useful to introduce into its proposition, provided the principle of it be safeguarded.

His Excellency Mr. **Martens**: If it is the purpose of the Peruvian delegation to facilitate an exchange of views between the Powers in dispute, resort to the Bureau may perhaps not be the best means to that end. It is much simpler for the Power desiring to arbitrate to address itself directly to the adverse Power or to a friendly Power. How could a bureau, with no diplomatic character, be apt to facilitate an exchange of views? It is better to leave it to the Powers to choose the most practical course.

His Excellency Sir **Henry Howard** concurs in the views expressed by Mr. MARTENS. The International Bureau has always been non-political, and, in his judgment, it must always retain that character.

[577] Mr. **Lange** does not see how one could lay a political character to the mere transmission which, according to the Peruvian proposition, should be entrusted to the Hague International Bureau. If a dispute threatens to arise between two States, there is generally between them an atmosphere of tension and ill-feeling. It seems, therefore, that it would be useful to put between them, at that moment, a shock-absorber that has nothing of a political nature about it, an intermediary which will facilitate communications. In consequence, Mr. LANGE supports the motion of Peru and sees no objection in also adopting the amendment offered by Chile if that could facilitate an understanding.

His Excellency Mr. **James Brown Scott**, in the absence of his Excellency Mr. CHOATE, reminds the committee that Mr. CHOATE had delivered an ad-

dress at the meeting of August 13 of the First Commission, to explain the reasons that seemed to him to operate in favor of the amended Peruvian proposition. He can but refer to that exposition and confirms the full adhesion of the delegation of the United States of America.

His Excellency Mr. **Martens** observes that the Bureau serves as a recorder to the arbitration court. It has, therefore, an exact rôle to fulfill, and this rôle may eventually be that of an intermediary, but we must be careful not to attach to it any political importance.

Baron **d'Estournelles de Constant** believes that there is some confusion. It is precisely the nature of the recorder and the administrative character of the Bureau which has induced his colleagues from Peru and from Chile to address themselves to that agency. What is our common purpose? It has been stated repeatedly: it is to discover the best means to make arbitration easy and accessible to all. Now the machinery suggested by Peru appears as ingenious as it is inoffensive. For let us suppose that a dispute arises between two Powers, how will these two Powers, all of a sudden, be able to reach an agreement upon the most difficult thing, namely, the acceptance of the principle of arbitration? That would require time, negotiations and especially a harmony that does not exist. It is very simple, on the other hand, for the Power desiring to have recourse to arbitration to address itself, for want of anything better, to the Hague Administrative Agency.

As to the objection of Sir Henry Howard who fears to give to the Bureau a political rôle, I reply by stating that the attributions entrusted to the Bureau are, on the contrary, essentially of a humble nature: it is desired that it be and that it remain a mere agency of transmission and it is merely for propriety's sake that I do not say "a letter-box."

From the moment when it is realized that the dispute cannot be settled through diplomacy, the neutral rôle of this Bureau, of this recording agency, purely automatic and purely administrative, may save the situation.

His Excellency Sir **Henry Howard**: If that is the intent of the Peruvian proposition, its phraseology might be modified in such a way as more completely to express the idea and to remove from the phraseology that which implies a political intervention.

Baron **d'Estournelles de Constant** concurs in this remark. The initiative and the responsibility of the Bureau seem to him too heavy according to the terms themselves of the Peruvian proposition. It might be modified along the line of the Chilean amendment. Does the delegate from Peru consent to such a modification?

His Excellency Mr. **Carlos G. Candamo**: Certainly.

The **President** wonders if the rôle of intermediary, which it is desired to have the Bureau fulfill, is not implied in the former Article 22. It is there stated that the Bureau "is the channel for communications." He is abso-
[578] lutely of the opinion that we must not make of it an agency with a political responsibility. It must not be used for *negotiating* exchanges of views: it must remain a mere agency of transmission. But this modest function is not a negligible one, and in certain circumstances, it may prove of great usefulness. By reason of the unfriendly relations existing between two States, a third Power might even feel embarrassed in accepting the rôle of an intermediary: the Bureau, on the contrary, will perform this rôle in an impersonal and automatic manner.

In short, all that which would transform the administrative character of the Bureau must be removed—and this principle has of itself been recalled *à propos* of the convocation of the future Hague Conferences. But the act referred to in the amended Peruvian proposition is an act of procedure: within these limits, he does not see any objections to its being accepted. On the contrary, he sees in it a real advantage.

Mr. **Lange** explains that no basic argument has been presented against the principle of the amended Peruvian proposition. We are not at all considering giving a new character to the Bureau. The Bureau, in the way in which the Chilean amendment specifies its rôle, must not express any judgment as regards the dispute. It acts as a mere agency of transmission or, if it is desired so to express it, as an official postal bureau.

His Excellency Sir **Henry Howard**: If it is desired to give to it a function analogous to that of an official postal bureau, all objections are removed; but we must be on our guard and not give to it a political character.

His Excellency Baron **Marschall von Bieberstein**: Could a bureau forward a request for arbitration without examining it? If, for instance, the contents are offensive, shall it forward the document?

The **President**: It is a matter of transmitting to the Bureau a "declaration" stating that such a Power is willing to submit to arbitration, and not an exposition of a situation. On the other hand it cannot be presumed that a State calling for arbitration would commit the fault of putting itself in the wrong by calling for arbitration in offensive terms. The interest of the amended Peruvian proposition is to prevent the matter of self-respect, the point of honor, becoming an obstacle. For the third friendly Power to which appeal for arbitration might be addressed may decline. The Bureau cannot do so. There is thus one more chance of making the transmission possible. Such is the rather great usefulness of this new postal bureau, a veritable international postal bureau.

An exchange of views takes place with regard to the provision of the Chilean amendment concerning non-retroactivity.

His Excellency Mr. **Carlos G. Candamo** consents to accept it if the committee deems it necessary.

Upon the proposition of his Excellency Mr. **Milovan Milovanovitch**, it is decided that it may without inconvenience be suppressed, inasmuch as it deals with purely optional and not obligatory arbitration, and since, in consequence, it would be superfluous to make such restrictions expressly.

Voting upon the Peruvian proposition is proceeded with, with the phraseology decided upon by the committee after discussion.

ARTICLE 27 *bis*

In case of dispute between two Powers, one of them may always address to the International Bureau at The Hague a note containing a declaration that it would be ready to submit the dispute to arbitration.

The International Bureau must at once inform the other Power of this declaration.

[579] *Voting for*, 13: The Netherlands, Great Britain, United States of America, Argentine Republic, Italy, Serbia, Peru, Mexico, Brazil, Norway, Portugal, Russia and France.

Voting against, 4: Germany, Austria-Hungary, Belgium and Sweden.
Abstaining, 2: Greece and Switzerland.
Articles 50, 51 and 52 are adopted without remarks.

ARTICLE 50

A permanent administrative council, composed of diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It shall present to them an annual report on the labors of the Court, the working of the administration and the expenditure. The report likewise shall contain a *résumé* of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 44, paragraphs 5 and 6.

ARTICLE 51

The expenses of the Bureau shall be borne by the signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date of their adhesion.

ARTICLE 52

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules, which shall be applicable to arbitration procedure, unless other rules have been agreed on by the parties.

ARTICLE 53

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are defined the subject of the dispute, the time allowed for appointing arbi-
[580] trators, the form, order, and time in which the communication referred to in Article 64 of the present Convention must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The *compromis* shall likewise define, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

His Excellency Mr. **Hammarskjöld** wishes to express his doubts as regard the usefulness of determining in so detailed a manner as is shown in Article 53, the contents of the *compromis.* His Excellency Mr. HAMMAR-

SKJÖLD fears that this phraseology might increase the chances that the Powers in dispute might not agree upon the *compromis*.

Nevertheless, the speaker will confine himself to these remarks and will not formulate any amendment.

ARTICLE 54

The Permanent Court is competent to settle the *compromis*, if the parties are agreed to have recourse to it for the purpose.

It is similarly competent even if the request is only made by one of the parties when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitily or implicitily excluding the settlement of the *compromis* from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question;

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants*, and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 55

In the cases contemplated in the preceding article, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 46, paragraphs 3 to 6.

The fifth member is *ex officio* president of the commission.

A short exchange of views takes place between the **President**, Mr. **Kriege** and Mr. **Guido Fusinato** with regard to the concordance which must be effected between Articles 54 and 55 on the one hand, and on the other, the corresponding articles of the project of the Convention relative to the Court of Arbitral Justice. It is found that the only difference in the texts consists in the phrase:

> unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question

which has been added to No. 1 of Article 54, and that it is not found in Article 22 of the Convention relative to the court of arbitral justice.

Mr. **James Brown Scott**, in his quality as reporter of the committee of examination B, states his willingness to include in his report and in the text of the Convention relative to the Court of Arbitral Justice the same addition, so that the two texts will be identical.

[581] Mr. **Georgios Streit**: Conformably to the instructions that I have just received, I am forced to make reservations concerning the new Articles 54, 55 and 59 of the Regulation. In view of the optional nature of the provisions contained in Chapter III, in conformity with the text of Article 52, I am wondering, in particular, if the provisions of Article 54, paragraph 2, points 1 and 2, are not to a certain extent in contradiction with those of Article 52. In case it should be found that there is no contradiction, these provisions might appear to be superfluous. At all events, it would seem that Articles 54, 55 and 59 would find

their more appropriate place in the text concerning the organization of a court composed in advance and of which the competence should be established, and that they square less with the organization of the existing court. If the second paragraph of Article 54 were to be left out, I believe that the Royal Government would have no objection to concurring in it.

The **President** and Mr. **Kriege** observe that the provisions of Articles 54 and 55 themselves are of only a conventionally obligatory character, that is to say, the obligation is not established by these provisions, but in the case of paragraph 1 by the general arbitration treaty, and in the case of paragraph 2 by the acceptance of the arbitration offer without reservation.

Mr. **Georgios Streit** does not see how the second paragraph of Article 54 can yield its effects in view of the fact that the court to which it refers is not constituted.

Mr. **Kriege** replies that no reference is made in Articles 54 and 55 to the Court of Arbitral Justice, but the references are to the Permanent Court now in operation.

Mr. **Georgios Streit** is of opinion that, especially in view of the organization of the present Permanent Court, difficulties will be encountered to determine how the authors of these provisions represent to themselves their operation in each particular case.

In answer to a question put to him upon this matter by the PRESIDENT, Mr. **Kriege** explains that the difference between the Commission referred to in Article 55 and the delegation referred to in Article 22 of the project of the Convention relative to the Court of Arbitral Justice is found in the fact that the latter is permanent whilst the Commission is appointed for each case separately, according to the provisions of Article 46, paragraphs 3-6.

His Excellency Mr. **Asser** desires to state that the discussion of this matter has clearly shown that it is highly desirable to establish a permanent agency and this with special regard to the drafting of the *compromis* in case of disagreement between the parties.

Mr. **Guido Fusinato** believes that there has arisen a misunderstanding with regard to the true meaning of the articles under discussion.

In proposing them, the authors did not presume that one of the parties would refuse to have recourse to arbitration. This eventuality cannot be admitted.

We are simply desirous of finding a means of overcoming the difficulties that may at times arise in establishing the *compromis*.

His Excellency Mr. **Carlin** declares that he will make reservations with regard to No. 2 of Article 54, which the Swiss Government is not inclined to accept.

The **President** has special record made of the reservations declared by Mr. GEORGIOS STREIT and his Excellency Mr. CARLIN.

[582] Mr. **James Brown Scott** calls the attention of the committees to the expression "obligatory *compromis*" which is found in the remarks of the report, preceding Articles 54 and 55. Mr. SCOTT doubts if these words are in harmony with the optional character intended to be given to the provisions of these articles.

Upon the proposition of the PRESIDENT the **Reporter** states that he is willing to come to an understanding upon this matter with Mr. SCOTT.

Articles 56 to 73 inclusive are adopted without remarks.

ARTICLE 56

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present act.

Failing the composition of the tribunal by agreement of the parties, the course referred to in Article 46, paragraphs 3 to 6, is pursued.

ARTICLE 57

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 58

The umpire is ex officio president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 59

When the *compromis* is settled by a commission, as contemplated in Article 55, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

ARTICLE 60

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

ARTICLE 61

The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting once fixed cannot be altered by the tribunal, without the assent of the parties.

ARTICLE 62

If the question as to what languages are to be used has not been settled by the *compromis,* it shall be decided by the tribunal.

ARTICLE 63

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

[583] They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 64

As a general rule, arbitration procedure comprises two distinct phases: written pleadings and oral discussions.

The written pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the *compromis.*

The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

ARTICLE 65

Every document produced by one party must be communicated to the other party in the form of a duly certified copy.

ARTICLE 66

Unless special circumstances arise, the tribunal shall not meet until the pleadings are closed.

ARTICLE 67

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes are signed by the president and by one of the secretaries and alone have an authentic character.

ARTICLE 68

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 69

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 70

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

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ARTICLE 71

The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 72

They are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

ARTICLE 73

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ARTICLE 74

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of law.

His Excellency Mr. **Hammarskjöld** proposes to replace the word "*treaties*" with the words "*papers and documents,*" because the *compromis* is not always established through an agreement between the parties.

This proposition is adopted.

ARTICLE 75

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its final arguments, and to arrange all the formalities required for dealing with the evidence.

With regard to the explanations which in the report precede Article 75, his Excellency Baron **Guillaume** states that one delegation has called his attention to the fact that the wording of these remarks is too rigorous. Yet, the Reporter did not feel that he could take them out of the report after he had found out that they are identical with the corresponding passage of the minutes.

Mr. **Heinrich Lammasch** states that at the time of the discussion of Article 75, some members of the committee thought that the "final arguments" [*conclusions finales*] would only be necessary in very complicated suits, whilst others believed that they would be needed in all cases. Finally, the idea prevailed that the article itself does not compel final arguments, but that the tribunal is entitled to issue an order on this matter.

Articles 75 and 76 are adopted.

ARTICLE 76

The litigant Powers undertake to supply the tribunal, as fully as they consider possible, with all information required for deciding the dispute.

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ARTICLE 77

For all notifications which the tribunal has to make in the territory of a third Power, signatory of the present Convention, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests can not be rejected unless the requested Power considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

His Excellency Mr. **Carlin** remarks that paragraph 2 of Article 77 does not stipulate that the requests which the tribunal shall address to the Government of a third Power, may be declined on the ground that the provisions of the domestic legislation of the country are opposed thereto. The provisions of Articles 76 and 77 are analogous to those of Articles 23 and 24 relative to the commissions of inquiry. Article 24, paragraph 2, referring to the requests addressed to third Powers, does not contain this reservation either. It is found only in Article 23, paragraph 2, which refers to the Powers in dispute. Now that which is stipulated in favor of the legislation of the Powers in dispute must, *a fortiori,* be stipulated in favor of the legislation of the third Powers. Mr. CARLIN believes that this remark ought to be taken into account, both with regard to the final phraseology of Article 77, paragraph 2, and for that of Article 24, paragraph 2.

Mr. **Kriege** explains that Article 77, paragraph 2 is a copy of the similar provision which is found in the International Convention dealing with procedure.

His Excellency Mr. **Hammarskjöld** believes that the reply of Mr. KRIEGE is not quite satisfactory. It is important to make a distinction between the Convention regarding civil procedure which deals with a limited object and the convention the project of which we are now discussing. The latter is general and includes all possible cases. In consequence, it would be preferable to include in it the reservation to which Mr. CARLIN has just referred.

Mr. **Guido Fusinato** is of opinion that the term " sovereign rights " in the second paragraph of Article 77 will be a sufficient safeguard for the interests of the States to which the requests are addressed.

His Excellency Mr. **Carlin** admits that the words " sovereign rights " may be interpreted in that sense; but he believes that it would be preferable to say so expressly and the more so because Article 23, paragraph 2, formally mentions this reservation in so far as the commissions of inquiry are concerned.

Mr. **Kriege** believes that the answer of Mr. FUSINATO entirely satisfies the remarks of Mr. CARLIN.

The **President** is of opinion that it would be just as well to avoid a difference between the provisions referring to the commissions of inquiry and those which we are now discussing.

Upon the proposition of the PRESIDENT, Mr. **Guido Fusinato** states that he feels inclined to reconsider the phraseology of these stipulations in order to give them the necessary concordance.

Save these remarks, Article 77 and later Article 78 are adopted.

ARTICLE 78

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president declares the discussion closed.

[586]

ARTICLE 79

The deliberations of the tribunal take place in private and remain secret.
All questions are decided by a majority of members of the tribunal.

His Excellency Baron **Guillaume,** with regard to the expression " and remain secret " found in Article 79, observes that these words are absent from Article 30 containing the corresponding provision relative to the commissions of inquiry. The Reporter proposes, in consequence, to make the text of these stipulations identical by adding the same words to Article 30 referred to. (*Approval.*)

Article 79 is adopted.

Articles 80 to 91 give rise to no remarks and are adopted.

ARTICLE 80

The award, given by a majority of votes, must state the reasons on which it is based. It contains the name of the arbitrators; it is signed by the president and by the registrar or the secretary acting as registrar.

ARTICLE 81

The award is read out at a public sitting of the tribunal, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE 82

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitively and without appeal.

ARTICLE 83

Any dispute arising between the parties as to the interpretation and execution of the award shall, provided the *compromis* does not exclude it, be submitted to the decision of the tribunal which pronounced it.

ARTICLE 84

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

ARTICLE 85

The award is binding only on the parties in dispute.

When there is a question as to the interpretation of a convention to which Powers
[587] other than those in dispute are parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 86

Each party pays its own expenses and an equal share of the expenses of the tribunal.

ARTICLE 87

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 88

Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Court (Article 45), exclusive of the members designated by either of the parties and not being *ressortissants* of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decision by a majority of votes.

ARTICLE 89

In the absence of any previous agreement, the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ARTICLE 90

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government which appointed him.

ARTICLE 91

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts be called. The tribunal has, on its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

Mr. **James Brown Scott** calls the attention of the committee to Article 63, paragraph 3. The delegation of the United States desires to insure the impartiality of arbitral decisions and cannot, in consequence, approve of the provision permitting the members of the Permanent Court to exercise the functions of agents, counselors or pleaders, not even in behalf of the Power that has appointed them members of the Court. The delegation of the United States proposes, therefore, to replace this paragraph 3 with the amendment of the Russian delegation.

> The members of the Permanent Court of Arbitration have not the right to plead before the Court as counsel or advocates for the States in dispute, nor to act as agents.

[588] His Excellency Mr. **Martens** supports the proposition of Mr. SCOTT. He dwells upon the improper situation that would be created for judges called upon to plead as advocates before their colleagues.

His Excellency Mr. **Mérey von Kapos-Mére** concurs in the view expressed which, moreover, is a view that the Austro-Hungarian delegation has always advocated in committee C.

Mr. **Guido Fusinato** explains that if, after long discussions, committee C has adopted the German proposition, it did so in order not to interfere with the freedom of the Powers in the designation of the judges. For it might indeed be feared that, if the Russian proposition were to become a law, the Governments might refuse to name as members of the Permanent Court all of their most eminent jurists, in order not to deprive themselves of their eventual services as advocates or counsel before that very Court.

Mr. **Heinrich Lammasch** believes that the basic reasons should prevail over reasons of opportunity. It is greatly to be desired not to confuse the functions of judge and advocate, which correspond to two different kinds of mind. Moreover, if a State had need of the services of one of its citizens, a member of the Court, the latter would need but resign his judicial position.

Mr. **Louis Renault** is not convinced by the words of Mr. HEINRICH LAMMASCH. In a general way he believes that it is wrong to speak of confraternity among the two hundred members entered upon the list of the Permanent Court. It is a fiction. On the other hand, if this spirit of confraternity does exist, it cannot disappear simply because of the resignation of the judge who becomes counsel. Finally, the general interdiction advocated by the Russo-American proposition, would embarrass the Governments not only in this or in that affair, but would even influence them at the moment when the list is being made up.

His Excellency Mr. **Martens** cannot accept the view of Mr. LOUIS RENAULT. It must not be forgotten that the States in dispute may designate one of their nationals appearing upon the list as a member of the arbitral court, and thus benefit by his services. But it seems absolutely inadmissible that men who were

judges only yesterday could appear to-day before their colleagues and confrères as advocates of a party to a suit and again become judges to-morrow. Such a thing is admitted nowhere in the world. Such a right would be harmful to the authority of the arbitral court.

His Excellency Mr. **Luis M. Drago** observes that in this case we are not dealing with judges but with arbitrators. But advocates appear everywhere as arbitrators.

The **President** emphasizes the weight of the argument presented by Mr. Louis Renault relative to the necessity of not hindering the freedom of the Powers in the choice of the judges.

His Excellency Sir **Edward Fry** supports the proposal of the United States of America.

His Excellency Mr. **Mérey von Kapos-Mére** believes that we are above all dealing with a question of dignity. The right to plead before the court would harm the prestige of the judges. On the other hand, it seems to him very useful to draw a general distinction between persons qualified to be judges, and those qualified to be advocates.

His Excellency Mr. **Milovan Milovanovitch** stresses the idea that it would be carrying things too far to deprive the Governments of the services of their nationals, merely because they appear on the list of the members of the
[589] Permanent Court, for the persons entered upon that list are not judges but merely *candidates* for judgeships.

His Excellency Baron **Guillaume** concurs in the view expressed by Mr. Milovanovitch.

His Excellency Mr. **Asser** reminds the members that Messrs. Beernaert and Descamps, members of the Court, have pleaded before it and no inconvenience has been thereby experienced. He appeals to the testimony of those who, with himself, have been arbitrators on that particular occasion, to wit, Sir Edward Fry and Mr. Martens. He is in favor of the text adopted by committee C.

The **President** puts the amendment of Mr. James Brown Scott to a vote.

The amendment of Mr. James Brown Scott is rejected by thirteen votes against five.

Voting for: Austria-Hungary, United States of America, Great Britain, Peru, Russia.

Voting against: Germany, Belgium, Brazil, France, Greece, Italy, Mexico, Norway, the Netherlands, Portugal, Serbia, Sweden, Switzerland.

The **President** declares that the labors of committee C have come to an end, and in the name of committee A, he offers to it congratulations for having so well taken care of such a delicate matter. (*Applause.*)

Committee A decides that it will hold no more meetings, because the report of Baron Guillaume is to be presented directly to the First Commission.

The meeting closes.

FIRST COMMISSION

FIRST SUBCOMMISSION

COMMITTEE OF EXAMINATION B

[593]

FIRST MEETING

AUGUST 13, 1907

His Excellency Mr. **Léon Bourgeois** [1] presiding.

The meeting opens at 10: 15 o'clock.

The **President** announces that he has received the text of a project for a permanent court presented jointly by the delegations from Germany, the United States of America and Great Britain.[2]

His Excellency Mr. **Choate** makes the following remarks which, as usual, BARON D'ESTOURNELLES DE CONSTANT translates while the committee is in session:

Ever since the appointment of the committee of examination this project has been the object of serious study by the three Governments of Germany, the United States, and Great Britain. We shall be much disappointed if it be not accepted.

The creation of the court would realize our highest aspirations, namely, the development of arbitration as an institution. We are unalterably convinced that the establishment of this court will be a great progress. The fact that the results of the present organization are so insignificant shows that the nations are in need of something more permanent and more substantial. It will be observed that the project does not modify in the slightest the present Convention. For a variety of reasons there may be numerous cases which do not lend themselves to the decision of the new court, and there are doubtless Powers which do not wish to resort to this new institution. These cases are within the scope and jurisdiction of the Permanent Court of 1899, which will remain at the

[1] As a result of successive designations made by the First Commission, the committee of examination B has been organized as follows:

President: his Excellency Mr. LÉON BOURGEOIS; *Vice President:* Mr. GUIDO FUSINATO; *Reporter:* Mr. JAMES BROWN SCOTT; *Secretary:* Baron D'ESTOURNELLES DE CONSTANT; *Honorary Presidents of the First Commission:* his Excellency Mr. MÉREY VON KAPOS-MÉRE, his Excellency Mr. RUY BARBOSA, his Excellency Sir EDWARD FRY; *Vice Presidents of the First Commission:* Mr. KRIEGE, his Excellency Mr. CLÉON RIZO RANGABÉ, his Excellency Mr. POMPILJ, his Excellency Mr. GONZALO A. ESTEVA; *Members:* his Excellency Mr. ASSER, Mr. FROMAGEOT, his Excellency Baron GUILLAUME, Mr. HEINRICH LAMMASCH, his Excellency Mr. MARTENS, his Excellency Mr. ALBERTO D'OLIVEIRA, his Excellency Mr. BELDIMAN, his Excellency Mr. CARLOS G. CANDAMO, his Excellency Mr. CHOATE, his Excellency Mr. EYSCHEN, his Excellency Baron MARSCHALL VON BIEBERSTEIN, Mr. LOUIS RENAULT.

Mr. GEORGIOS STREIT has taken the place of his Excellency Mr. CLÉON RIZO RANGABÉ, prevented.

[2] Annex 80.

disposition of the Powers. We suppress nothing; we add another means of international conciliation.

[594] We desire a court easy of access, open to the whole world, composed of judges representing all the systems of jurisprudence of the world, and, as the representative of all the nations of the world, we have naturally endeavored to include in the composition of the court representatives of the entire world.

In addition, the court should be able to assure the continuity of jurisprudence. The present Permanent Court has not gone far in the direction of establishing and developing international law. Each case is isolated, lacking both continuity and connection with the other. A permanent tribunal, deciding cases in relation with each other, would evidently be a means of unifying the law, and therefore claims on this account the attention of the world.

I shall not develop the details of our project as adopted by the three Powers. The points about which we differ have been noted in the margin, and the decision is left to the wisdom of the committee.

A section of the court will be organized to adjust urgent cases, in such a manner as to be always in session, ready to receive and decide the case presented.

For the discussion of the project we might properly adopt the method followed in the consideration of the prize court, that is to say, to reserve the right to vote only after discussion, and to reserve the consideration and determination of the question of judges until the end.

If we begin thus, we shall be doing important work.

The establishment of the court will be not merely a mark of progress; it will be an institution, irreproachable and just to all nations. It is a tribunal so ardently awaited by the world that we should be justified in creating it, even though every State should not accept it, provided only the door be left open to all. You have not forgotten that the First Conference left open the question of adherence, and little by little the nations have adhered. If necessary, let us do the same for this truly Permanent Court.

There is everywhere a mass of cases awaiting the judges. Therefore let us hasten to the work, and under the vigorous direction of our President we shall make great progress.

His Excellency Baron **Marschall von Bieberstein:** The German delegation shares the view so eloquently expounded by Mr. CHOATE. We are ready to support with all our strength the project presented by the United States of America.[1] We regard the constitution of a permanent court as the not merely useful, but also the necessary complement of the labors of the First Conference.

Far be it from me to think of criticizing the work of the Assembly of 1899: it has had the great honor to take the first step on the road which leads to world arbitration. This first step has been prudent and moderate, as was proper.

Nevertheless, the Court created in 1899 has not yielded all the services which had been expected from it.

One of our most distinguished colleagues who took an active part in its elaboration stated in a recent discussion that during a period of eight years the Court operated only four times. It is true that he added that the fault lay with the Governments. I do not wish to go into the matter to see if this criticism is justified. If it were true, it would be necessary to make repetition of this fault as difficult as possible for the Governments.

[1] Annex 80.

Everyone realizes that the present Court is too costly, that the procedure is too long and too complicated. For each case it is necessary to constitute a tribunal.

[595] If, on the contrary, a really permanent court were instituted, composed of judges who by their competence and their honesty enjoyed general confidence, it would, as I have stated, exercise an automatic attraction for disputes.

Objection has been raised against the court by stating that it had not enough work. This objection reassures me, for I feared, on the contrary, that it might be overwhelmed and that the various ministries might release to it all old disputed cases of which they have a great plenty in their portfolios.

Its career will probably be that of all human affairs: *in medio stat veritas.* It will not be overwhelmed with work; but it will not be unoccupied.

If you will now permit me to complete the expression of my thought as regards the future of our labors, I shall frankly state that in my opinion, it will be better to have an optional arbitration surrounded with institutions enjoying a general confidence, thus gaining ground every day by the free will of the parties, than obligatory arbitration, necessarily restricted to a small field which it will be very difficult to extend subsequently.

His Excellency Sir **Edward Fry,** in the name of the British delegation, approves of the project for a permanent court as presented by Germany and the United States.

This project contains, of course, many details which must be discussed, but we must not lose sight of the fact that it was difficult to elaborate it and that it represents the result of the conscientious work of three great Powers. He hopes, therefore, that it may meet with a good welcome.

His Excellency Mr. **Asser** states that he need not call attention again to the fact that he entertains the fullest sympathy for the project of a permanent court. Having had personal experience in an arbitration case with the system of 1899, he approves of the criticisms just passed upon it. One of our distinguished colleagues has well summarized them by saying that the Hague Court was a *heavy moving* organism. That is true. It is difficult, it is long and costly to put it into motion.

I would insist upon a special point. In the new project reference is made to a special committee of three judges (Article 6). I have already remarked that the Netherland Government had felt the need of creating such a committee. It had merely been baptized in advance by the modest name of committee of procedure, and its principal rôle would have been to establish the *compromis* in case difficulties had arisen. It was hoped also that a large number of disputes would be kept before this committee and there receive a quick settlement without the need of convoking the Court. It was, in a word, a sort of semi-judicial and permanent organ.

If we have renounced depositing a project in that sense, it is because there have been presented more extended propositions which encompassed our idea.

His Excellency Mr. **Léon Bourgeois** outlines the spirit with which the French delegation receives the project for a truly permanent tribunal:

We have already said with what favorable sentiment we would regard any attempt tending to give to the international institution of 1899 the *permanency* of the judges and the *stability* of the decisions.

It is, therefore, with the greatest sympathy that we propose to cooperate in every effort which tends to realize those two purposes.

I should have been satisfied with making this simple affirmative statement if with the fine irony in which he excels, Baron MARSCHALL had not made a discreet excursion into another field.

Very wittily he has observed that the partisans of obligatory arbitration may possibly act against their wishes: by including general arbitration in a small number of obligatory cases, they would run the risk of setting bounds to it and of preventing it from developing.

[596] I merely wish to state that our study of the propositions concerning the court must not imply a sort of abandoning of the projects relative to obligatory arbitration, the more so because the United States is the author of one of these projects.

The important thing to do is not only to establish a more or less lengthy enumeration of disputes that the States engage themselves to submit to arbitrators. The important thing is to affirm a principle. We are to show that ideas have progressed since 1899. By some tangible means we are to indicate that the States have mutually recognized new duties, and that they are conscious of their mission toward the peoples. The essential thing is to recognize some cases of obligatory arbitration in order to affirm the principle of this high juridical and moral obligation.

Let me once more state my thought in a very few words: Baron MARSCHALL has likened the project for a permanent arbitration court to an admirable framework; I ask all of you to put a painting within that frame.

His Excellency Mr. **Beldiman** observes that in view of the fact that the proposition of the delegation from Germany, the United States and Great Britain has not yet expressed itself with regard to the manner in which the judges appointed by the signatory Powers are to sit in the court—a matter of principle termed *capital* by the authors themselves of the project—any discussion would for the moment seem premature.

In consequence, he again requests the delegation from the United States to be good enough to communicate to the Commission the project in as complete a manner as possible, so that it may be possible to submit it to the respective Governments and consult them about it.

Mr. **James Brown Scott** states that the plan containing the project for the composition of the court cannot be distributed until the next meeting. He proposes, therefore, the provisional reading of the proposition.

The **President** thinks that the manner of procedure followed on the occasion of the discussion of the project concerning the composition of the High Prize Court might be adopted, by beginning a provisional study under reservation of the subsequent voting. Thus the true scope of the project might be further illuminated and the members of the committee enabled better to inform their Governments.

According to this view of the matter the **President** takes up the reading of Part I: Organization of the International High Court of Justice.

PART I.—Constitution of the International High Court of Justice.

Article 1

With a view to promoting the cause of arbitration the signatory Powers agree to constitute, alongside of the Permanent Court of Arbitration, an International High Court of Justice, of easy and gratuitous access, composed of judges representing the various judicial systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

Mr. **Guido Fusinato** desires to know what meaning is to be given to the word "gratuituous," in the opinion of the authors of the proposition.

Mr. **Kriege** states that according to the terms of the article, "access" alone to the court is gratuitous, and that lawyers' fees and other expenses of that nature may devolve upon the parties.

Mr. **Heinrich Lammasch** wishes to call the attention of the committee to a point which might at first sight appear to be insignificant, but which is [597] nevertheless of great importance. He refers to the question of the name which is to be given to the new court. He fears that the term "International High Court of Justice" might convey the idea that the court would be called upon to take cognizance of cases of revision or of appeal, and such an idea would be contrary to its character as an arbitral court. The proposed name would somewhat correspond to the idea of "United States of the World," an idea which would be very harmful to the development of arbitration. Mr. Heinrich Lammasch does not at present desire to present a proposition, believing that the name to be given to the new institution must depend upon the question as to whether or not the new court shall be created within or apart from the existing court.

His Excellency Baron **Marschall von Bieberstein** believes that the terms in which the beginning of Article 1 is conceived can leave no doubt as to the true character of the new court.

His Excellency Mr. **Asser** shares the opinion expressed by Mr. Heinrich Lammasch; in the first place, because of the reasons adduced by the latter, and also because the new court would seem to take the place of that of 1899, which must not become a fact.

Without establishing a necessary distinction between the old and the new courts, the name of the latter might be *"Permanent Tribunal of Arbitration."* On the other hand, the court established in 1899 can henceforth no longer be called *"permanent,"* and the term *"International High Court of Arbitration"* would be a more fitting name.

His Excellency Sir **Edward Fry** believes that there is a misunderstanding. The term *"High Court,"* at least in Great Britain, does not necessarily imply the idea of a court of appeal, but applies also to the jurisdiction in first instance of certain cases of great importance. High court does not signify court of appeal, but a court of great importance. In the United States, the word *Supreme* court, and not *High* court is employed. He fears that the words *"permanent tribunal of arbitration"* may lead to erroneous interpretations because they resemble too closely the words *"permanent court of arbitration."*

Mr. **Louis Renault** supports the opinion expressed by Mr. Heinrich Lammasch and by his Excellency Mr. Asser. He shows that it is important to express clearly that none of the three institutions of justice of different

competence, which may henceforth exist, shall be superior to the other two: the permanent court which is to be created, the old Court of 1899 and the Prize Court shall be independent of one another.

His Excellency Mr. **Ruy Barbosa** fully approves of the opinion expressed with such remarkable clearness by Mr. HEINRICH LAMMASCH. Mr. LOUIS RENAULT has set in strong relief the impropriety of the denomination of High Court attributed under Part I of the project, to the institution now under discussion. A high court necessarily presupposes inferior courts. What is their position with regard to the court which we are thinking of organizing? Is there another international court of first instance? No. In that case no other courts would be left in this relation of hierarchical inferiority, except the national courts. Still this is in no way the intention of the project.

But it is from an entirely different view-point from the one explained by Mr. HEINRICH LAMMASCH, that the use of the denomination indicated seems to us subject to criticism. It replaces the idea of arbitration with that of justice. This does not mean that justice has no share in arbitration; but we are dealing now with arbitral justice.

Arbitration is the only means of organizing justice among the nations. When we refer to justice between individuals, mention of a court is associated with the thought of a subjection, of a bond of obedience imposed by a sovereignty upon its subjects. In that case justice has a power felt by
[598] those subject to it. But, as between nation and nation, justice depends upon an authority instituted through convention, through the power conferred by those to be judged upon those who are to judge their disputes. This represents the principle of arbitration.

Therefore it is essential that we should leave to arbitration the dominating place which belongs to it in the organization of international justice. Without it we would gradually slip into the Utopia of the United States of the World to which Mr. HEINRICH LAMMASCH referred. It is not a matter of name, it is a matter of principle the scope of which will be realized later while we discuss the project itself.

His Excellency Mr. **Choate**: We shall leave it to the committee to baptize the child. If all the godfathers agree upon a name, we shall subscribe to their choice. After the child shall have been baptized it is not its name, but its acts, that will make it succeed in life.

The **President**: It is not merely the name but the sex of the child which we are to determine. At all events, the committee has agreed that the new institution shall not take on the character of a court of appeal.

The term "alongside" in Article 1 expresses in his opinion altogether too much of an idea of independence, while we are rather considering the forging of a bond between the old court and the new.

His Excellency Sir **Edward Fry** prefers the retention of the term "along side" because it better expresses the idea of emulation and equality.

The **President** believes that the new court could not become a parasite plant which might destroy the tree itself. Never could it solve the great political problems for which a purely arbitral court is necessary. In consequence, it behooves us to do nothing which might put the institution of 1899 in the shade. On the other hand, the new instrument is more precise; it will operate more rapidly and its task is of a particular kind. It would be well to find a formula

indicating that there exists a bond between the two jurisdictions; the new court will be, so to say, the permanent instrument of the present court.

His Excellency Mr. **Mérey von Kapos-Mére** believes that the term *"while maintaining the present court"* would be preferable to the words *"alongside of the present court."*

Upon the proposal of the **President,** the committee designates as members of its drafting committee: Mr. Heinrich Lammasch, his Excellency Mr. Asser, Mr. Louis Renault, Mr. Eyre Crowe, Mr. Kriege and Mr. James Brown Scott, especially charged with the wording of Article 1.

Article 1 with the observations presented with regard to it, is referred to the drafting committee.

Article 2

The International High Court of Justice is composed of judges and deputy judges all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court shall be named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present Convention.

[599] His Excellency Mr. **Ruy Barbosa** calls the attention of the committee to the second paragraph of this article and its last clause. It is there stated that the deputy judges of the court shall be appointed by the signatory Powers, "that select them, *as far as possible,* from the members of the Permanent Court of Arbitration."

If we did not here meet with the accessory term "as far as possible," it would represent a provision, that is to say, a real *compromis,* insured by the contracting parties, by means of which they would engage themselves to select the judges from the members of the Permanent Court.

But the restrictive clause "as far as possible," and the idea conveyed by it that each party, in so far as it is concerned, shall be the judge of this possibility, robs absolutely such a provision of its imperative character, by transforming it into a discretionary right. The legal bond disappears altogether, and there is only left a wish, expressed by the signatory Powers who leave the realization of this wish to the free will of the parties interested.

But it is not for the purpose of expressing wishes that conventions are entered into; it is exclusively for the purpose of establishing obligations between the parties. But in the text before us only one obligation is imposed upon the contractants: the mutual recognition of the right to select deputies from amongst the judges of the Permanent Court. Juridically, therefore, we may only conclude from this text the affirmation of the compatibility between the functions of deputy and those of a judge of the Permanent Court.

In consequence it would be necessary to modify it. Instead of declaring that the Powers shall from the list of members "select" the deputies "as far as possible," that is to say, instead of pretending to stipulate an obligation by immediately annulling it in converting it into a right, it would suffice to establish this right, by declaring that the deputies *may* be selected by the signatory Powers from the list of members of the Permanent Court.

His Excellency Baron **Marschall von Bieberstein** states that it was the desire to express that the selection from amongst the judges of the Court of 1899 must be the rule.

His Excellency Mr. **Asser** believes that one might increase from four to five the number of judges to be indicated for each country in case it were decided that the selection of judges from among the members of the Court of 1899 should be obligatory.

His Excellency Mr. **Choate** states that the number of five judges to be indicated by each country would be too large. The total number of judges amounts even now to one hundred and eighty, which is certainly a large number. One more judge for each country would increase this number to two hundred and twenty-five.

The **President** shares the opinion expressed by Mr. CHOATE, but he would very much like to have a bond established between the two courts.

With regard to the remarks offered by Mr. SCOTT, the PRESIDENT states that the difficulty would be the same for any system that might be proposed: certain men will be prevented from sitting in court by reason of other functions they perform. They will have to make their selection and give up either the one or the other. It devolves upon the Governments to make arrangements in this matter.

His Excellency Sir **Edward Fry** declares likewise in favor of a freedom of selection as wide as possible. There might be persons possessing all the necessary qualities for sitting in the Court of 1899, who, however, would not meet the conditions required for the post of judge in the new court.

The **President** would wish that the arbitrators of the new court might be chosen by those of the Court of 1899.

[600] After some remarks upon this matter offered by Mr. KRIEGE and his Excellency Sir EDWARD FRY, the **President** in summarizing the discussion declares that the committee is confronted by two distinct opinions, the one in favor of a free selection, and the other for a restricted selection. The PRESIDENT wonders if by means of the expression *"for lack of,"* it might perhaps be possible to secure a phraseology that would conciliate the various points of view.

His Excellency Sir **Henry Howard** fears that the expression *"for lack of"* may prove of a nature more or less offensive to the members of the old court who might not be designated as judges in the new court.

His Excellency Baron **Marschall von Bieberstein** is in favor of retaining the phraseology of the propositon.

Article 2 is returned to the drafting committee who shall take into account the preceding remarks.

ARTICLE 3

The judges and deputy judges are appointed for a period of . . . years, counting from the date on which the appointment is notified to the administrative council of the Permanent Court of Arbitration. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of . . . years.

(*Referred to the drafting committee.*)

ARTICLE 4

The judges of the International High Court of Justice are equal, and rank according to the date on which their appointment was notified (Article 3, paragraph 1), and, if they sit by rota (Article 5, paragraph 3), according to the date on which they entered upon their duties. The judge who is senior in point of age takes precedence when the date of notification is the same.

They enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before entering upon their duties, the judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and upon their conscience.

(*Referred to the drafting committee.*)

The **President** remarks that with regard to Article 4 (paragraph 3) as well as with regard to other parts of the proposition, the work of the committee of the Prize Court and of this committee must be compared.

ARTICLE 5

The Court is composed of seventeen judges; nine judges constitute a quorum.

The judges appointed by the following signatory Powers: . . . are always summoned to sit.

[601] The judges and deputy judges appointed by the other Powers shall sit by rota as shown in the table hereto annexed.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

(*Referred to the drafting committee.*)

His Excellency Mr. **Ruy Barbosa** wishes to say a word with regard to what Mr. SCOTT stated as to the deposition of the plan of the composition of the court, in the meeting of Saturday.

This part of the project is the most important. It is the essential matter which will decide as to the possibility of creating this institution. To realize its creation the authors of the project have devoted themselves to very lengthy and ungrateful labor. This is because the difficulties of the matter are considerable. The same difficulties have been met with by those who took the initiative in the question. They will certainly be as great for those who shall examine them to see if they can accept the proposition.

It is, therefore, quite evident that if we are not acquainted before next Saturday with the system adopted for the constitution of the court, when we have been waiting for weeks during which this work has been in hand, we could not discuss it at the present meeting. Time will have to be given us so that we may examine the system, consult our Governments and cast our vote with a full understanding of the matter.

ARTICLE 6

The High Court shall annually nominate three judges, who shall form a special committee during the year, and three more to replace them, should the necessity arise.

Only judges who are called upon to sit can be appointed to these duties. A member of the committee cannot exercise his duties when the Power which appointed him is one of the parties.

The members of the committee shall conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

Mr. **Heinrich Lammasch,** in order to ensure impartiality as far as possible, proposes to add after the words " which appointed him," of paragraph 2, the clause: *" of which he is the ressortissant."*

Mr. **Kriege** states that in the judgment of the authors of the project, it is especially important to exclude the judges appointed by the Powers in dispute, but that it would not, however, be desirable to extend this exclusion to the judges who come within their jurisdiction. In consequence, he approves of the view expressed by Mr. HEINRICH LAMMASCH.

His Excellency Mr. **Alberto d'Oliveira** desires to know in what manner the special committee referred to in Article 6 is to be appointed.

Mr. **Kriege** declares that in his judgment this matter may be settled by the High Court itself in its regulation referred to in Article 23.

His Excellency Mr. **Alberto d'Oliveira** believes, on the contrary, that the manner of appointing this committee must be settled by the Convention itself. The question is a very delicate one and if it were not settled in advance, it would undoubtedly give rise to serious difficulties within the High Court itself.

Mr. **Kriege** desires to reserve his answer upon this question until the main question of the composition of the court shall have been settled.

The article is returned to the drafting committee.

The meeting closes at the hour of noon.

SECOND MEETING

AUGUST 17, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10: 10 o'clock.

The minutes of the first meeting are adopted.

The program for the day includes the continuation of the discussion of the proposition of the United States, Great Britain and Germany concerning the permanent court.[1]

His Excellency Mr. **Lou Tseng-tsiang** has the floor and reads aloud the following declaration:[2]

The permanence of an arbitral jurisdiction at The Hague being a real forward step in the way of progress, and inspiring us with the pacific spirit which has traditionally animated the Government of Peking, we render honor to the initial and highly humanitarian proposition presented by our very honorable colleagues of the United States of America—a proposal which we are entirely disposed to support warmly and to vote.

Nevertheless, we are not unaware of the difficulties that will be encountered in the constitution of the Permanent High Court, and above all in the distribution of judges among the numerous States here represented.

According to the eloquent statement of Mr. Scott, the number of judges will be sixteen or seventeen, and the population with the colonies will be taken as basis of the representation to this court, which shall be constituted and sit as a judicial tribunal according to international law and not according to a particular legislation.

With the purpose of removing all inequality in the distribution of the judges in question and of facilitating the constitution of the court, the delegation of China has the honor to suggest to the committee of examination the idea of taking as a basis the following table of the distribution of the expenses of the International Bureau among the participating countries, together with the indication of the units; thus fixing the classification of the States:

	Germany	25 units
	Austria-Hungary	25 "
	Belgium	15 "
[603]	Bulgaria	5 "
	China	25 "
	Denmark	10 "
	Spain	20 "
	United States of America	25 "

[1] Annex 80.
[2] Annex 82.

United Mexican States	5	units
France	25	"
Great Britain	25	"
Greece	5	"
Italy	25	"
Japan	25	"
Luxemburg	3	"
Montenegro	1	"
Norway	10	"
Netherlands	15	"
Persia	3	"
Portugal	10	"
Roumania	15	"
Russia	25	"
Serbia	5	"
Siam	3	"
Sweden	15	"
Switzerland	10	"
	375	units

It is of course understood that this table remains open to the States not represented at the First Peace Conference and convoked to the Second and who have all recently adhered to the Convention of 1899 for the pacific settlement of international disputes.

In case the *basis of population* indicated in the explanatory statement of Mr. Scott should not be taken into consideration, the delegation of China, despite its ardent desire to associate itself with the American proposal, would be obliged to abstain from voting and would reserve the right to name new arbitrators for the old permanent court.

His Excellency Baron **Marschall von Bieberstein** states that the authors of the Convention project relative to the establishment of the High Court have differed in opinion as regards the principle contained in Article 7, paragraph 1. In order to insure the absolute impartiality that the court must offer to the States which will be parties before it and all of which, great and small, as sovereign Powers, expect to be treated with a perfect equality, the delegations of Great Britain and of the United States had proposed that no judge should take part in the examination or in the discussion of a case if the Power which appointed him is one of the parties. On the other hand, the delegation from Germany advocated the system which guarantees to each of the litigant parties the right to have a judge appointed by it take part in the suit.

In support of his proposal Baron Marschall sets forth that it is desirable to distinguish clearly between the national jurisdiction and international
[604] arbitration. In the former it is incontestable that no one could be judge in his own cause. In the arbitration system, on the contrary, the principle of free selection of the arbitrators must prevail. Arbitral functions have most frequently been entrusted to arbitrators whom the parties designated at will, and this method was confirmed by Articles 15 and 32 of the Convention of 1899.

Baron MARSCHALL sees no reason for departing from the system which has been adopted and believes it necessary to grant to each party the judge whom it desires. If at the time of the dispute, and in accordance with the scheme of rotation, no judge appointed by the State in controversy sat in the court, such State or, if necessary, each of the Powers to the dispute, would have the right to appoint one. In such case, one or two of the sitting judges would have to yield their place to the judges chosen by the parties.

This system would not only insure greater impartiality, but the presence of the judges of the parties would, furthermore, exercise an influence which would make it necessary for the parties to spare susceptibilities all around and in the decision to avoid expressions more or less offensive which might prove the source of new difficulties.

Baron MARSCHALL, therefore, proposes a new Article 5 *bis*, reading as follows:

ARTICLE 5 *bis*

If a Power in dispute has, according to the rota (Article 5, paragraph 3), no judge sitting in the Court, it shall ask of the Court that the judge appointed by it take part in the settlement of the case. Lots shall then be drawn as to which of the judges entitled to sit according to the rota should withdraw.

His Excellency Mr. **Choate**, by way of preliminary remark to the discussion, would like to observe that it would be in the interest of a prompt achievement of the labors of the committee to meet as often as possible, and, so to say, be in permanent session beginning with Monday next.

The **President** along with the whole of the Conference desires to energize the labors still under way; but this does not depend upon him; he will not fail to call together the members of the committee as often as the labors of the other committees and commissions of the Conference may permit thereof.

ARTICLE 7

Proposition of the Delegations of the United States of America and Great Britain

In no case, unless with the express consent of the parties in dispute, can a judge participate in the examination or discussion of a case pending before the International High Court of Justice when the Power which has appointed him is one of the parties.

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the High Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act there in any capacity whatsoever so long as his appointment lasts.

[605] His Excellency Mr. **Choate** taking part in the discussion concerning the court, sets forth that the delegations from Great Britain and from the United States, while proposing that no judge might take part in the labors of the court if the Power which named him is a party to the dispute, desired merely to establish a rule which has not only been adopted by American jurisprudence, but which, it may be said, constitutes a principle of universal law. We cannot depart therefrom without prejudicing the judicial character of the court and without leaving within the latter a door open to international disagreements.

Mr. CHOATE is aware of the fact that it is proper to distinguish between the idea of arbitration and that of jurisdiction, and it is true that the United States itself has contributed to the constitution of arbitration courts in which, apart from the umpire, there were only judges named by the parties, with the result that the umpire alone decided; but Mr. CHOATE is, nevertheless, convinced that it is preferable to adhere to the principle that no one can be a judge in his own cause.

Nevertheless, the delegation of the United States understands that an institution as important as the Permanent Court can be created only through mutual concessions. In consequence, and in spite of the determined views of the delegation in this matter, it declares its willingness to accept the proposition of Baron MARSCHALL. It is aware of the fact that the large number of judges tends in a measure to weaken the force of the objection which it has just presented, and, in a spirit of conciliation, although reluctantly, it accepts the German proposition.

His Excellency Mr. **Martens** states that he concurs in the proposition of the delegation from Germany. It is true that the principle which it adopts could not form the basis of a national jurisdiction, but it conforms to international practice. His Excellency Mr. MARTENS does not share the view of those who might fear that the rôle of the judges of the parties might fall below that of their colleagues, and in support of his way of looking at this matter he refers to the example of the *Alabama* affair which did not bring about such a situation. He recalls the names of Lord RUSSELL OF KILOWEN and of the Master of Rolls, HENN COLLINS. His Excellency Mr. MARTENS finds in the German proposition a guarantee that regard will be had for national susceptibilities, and he believes that through it international justice will be founded upon more solid bases.

Mr. **Heinrich Lammasch** would like to know if the German proposition is to be understood in the sense that, in case a judge named by one of the Powers to the dispute is already sitting in the court, he would, nevertheless, retain his position, and would not be designated by lot as obliged to yield his place to the judge to be named by the adverse party.

His Excellency Baron **Marschall von Bieberstein** replies in the affirmative and he feels convinced that the committee will be able to secure a phrasing which will leave no doubt upon this matter.

His Excellency Sir **Edward Fry** does in no way regard the principle expressed in the German proposition as an ideal one. But, influenced by the spirit of conciliation and compromise of which the delegation from the United States has given proof, his Excellency Sir EDWARD FRY declares his willingness to accept the German project. He would like to know if the same principle will also be applied to the committee referred to in Article 6.

Mr. **Kriege** states that the answer to this question has already been given in Article 19, according to which the parties in dispute have the right each to designate a judge to the committee with deliberative vote.

His Excellency Mr. **Asser** concurs in the proposition of Baron MARSHALL. Nevertheless, he would like to call the attention of the committee to the hypothetical situation when more than two parties should be in dispute. Will all have the right to name a judge?

[606] His Excellency Baron **Marschall von Bieberstein** is of opinion that in case A should be, for instance, the plaintiff, and B, C and D defendants,

B, C and D should come to an understanding concerning the selection of a judge whom they would name together.

His Excellency Mr. **Asser** would like to know if an *"ad hoc"* judge is to be named in case a litigant Power should not be represented in the court by a judge. This might even be the case of a nation which, according to the rotation schedule, should be represented in the court during only a few years.

The **President** and his Excellency Baron **Marschall von Bieberstein** are of the opinion that it is understood that in the case referred to by his Excellency Mr. Asser the judge whom the litigant Power might have named in virtue of the Convention would be called upon to sit without having been recorded in the rotation schedule.

Mr. **James Brown Scott:** The project for the organization and jurisdiction of a permanent court, which the three delegations have had the honor to lay before the committee, necessarily presupposes the presence of judges, for without their presence the court exists, if at all, in name, not in fact. The selection of the judges, therefore, is of fundamental importance, and it may be said that the creation of the court depends in a large measure upon a method of selection which shall satisfy the legitimate desires of the countries represented at the Conference.

If each country were to appoint one judge, and if these judges so appointed should be entitled to sit at one and the same time, the problem would be simple. Forty-six judges, however, form a judicial assembly, not a court. We wish, however, a court, not a judicial assembly. It would seem that a court of the kind we propose could not consist of more than fifteen or seventeen members without becoming unwieldy, and on that theory it is necessary that some means be devised for the selection of that or of a smaller number. The difficulty of the problem is at once apparent, but difficult as it is, the problem must be solved. It is evident that no plan can be satisfactory which does not give to every State the right to representation, for in international law the equality of right is axiomatic.

Each State—be it large or small, an empire of one hundred million or a republic of a few hundred thousand—should possess the right to appoint, and should actually appoint, a judge of its own choice for the full period contemplated by the Convention, namely, twelve years. The exclusion of a single State from the proposed court, or the denial of the right of a single State to appoint, would proclaim the principle of juridical inequality and vitiate in advance a project, however carefully it be drawn and however acceptable it might otherwise be.

It may be admitted, however, that the exercise of the right might be regulated without in any way questioning the existence of the right. If every nation has the right to appoint, and does appoint, a judge, it is no derogation from the principle of sovereignty and equality that the judges so selected may sit at various times and in rotation. Great as is the difficulty, we feel that it is capable of solution, and we also feel that this committee can devise a satisfactory project, if it be the earnest and sincere desire of the committee to solve the problem and to establish the court.

Animated by the desire to establish the court and to contribute effectively to its creation, we submit, with great diffidence, to your careful considera-
[607] tion a plan, frankly admitting its imperfections, but feeling that it may be

acceptable unless a better plan should be proposed. The plan which we lay before you is based, in general, upon the principle of population, for we believe it self-evident that large aggregations of people have large interests, and that there is, in general, a relation between population on the one hand and industry and commerce on the other.

We also believe that industry and commerce give rise to conflicts, and that it may well be that a nation with a very numerous population, and with large commercial and industrial interests, feels it necessary to have a constant representation in the court, in order that its interests may be protected and safeguarded by a judge of its own choice.

We admit, however, that the interest of the smaller nation is just as keen, although their conflicts may be less frequent or less serious; and it would seem just, therefore, that no nation, however small it may be, should be deprived of the same right to watch over and protect its interests by a judge of its own choice.

We do not believe that any one principle should be pushed to its logical extreme without due regard to other interests. The theorist and logician might be content to rise or fall in the defense of a principle adopted by him. The practical man—the man of affairs, the statesman—must many a time modify, indeed sacrifice, a principle, however just, to meet a present and pressing need.

While, therefore, we have adopted population in general as a satisfactory principle, we have at one and the same time considered the interests of industry and commerce, and we have consciously departed from the principle in order to do justice to various other material interests.

We have also felt that the systems of law at present existing in the civilized world should be considered, and we have not hesitated to depart from the principle of population, or to give less attention to industry and commerce, when different systems of jurisprudence demanded recognition. Nor have we been unmindful of the traditions of the past, and we confess that in apportioning representation in the court we have not overlooked the fact that great traditions have a pressing claim upon us, and that they may well of themselves modify the results that would spring from the rigid application of an abstract principle. Questions of political geography have also influenced us, and we have taken into consideration the geographical situation as affecting the liability to international conflict.

Should we apply exclusively the principle of population without taking into consideration other elements which complicate the problem, we feel that injustice might be done to less populous States. But whatever these elements may be, we must insist that no distinction be made between the States of Europe and of America possessing approximately the same qualifications, whether those qualifications be population, industry, or commerce.

It seems to us, therefore, possible to assign to certain States a permanent representation in the court, and, with due regard to population, industry, commerce, system of law, and language, to permit each State representation for a longer or shorter period by a system of rotation.

A careful analysis of the table which we have the honor to lay before you shows that in each year the various languages, the various systems of law, will be represented, and that the Spanish-American law will be represented every year by two or more judges out of seventeen.

[608] It should be stated further that each country entitled to appoint a judge

is entitled to appoint a deputy judge for a like period, and that in the absence of the principal judge the deputy may sit. Should the State prefer to appoint one judge for a term and the same judge as a deputy for a like period, it would follow that it could in this way acquire an additional representation, as will appear from the table before you.

The method suggested leaves to each State the right to be represented, and regulates, it is hoped, in a fair and equitable manner the exercise of this right. Should, however, nations prefer to combine, thus forming groups, and elect judges and deputy judges for the sum total of their terms, the system proposed is flexible enough to permit this. Each State is thus left entire liberty, either to be represented directly by a judge of its own nation or to combine with others to select a common judge for a longer period.

As the result of careful and prolonged discussion it seems probable that each nation prefers to have a judge of its own choice upon the bench whenever it appears before the court as plaintiff or defendant. Should this be the preference of the committee, we are prepared to submit a plan which will permit the appointment of a judge of each of the litigant parties when such judge is not already upon the bench. In this way each nation before the court may be represented by agent, advocate and counsel in order to see that its case is properly presented to the consideration of the court, and will have, in addition, a judge upon the bench itself in order to see that the case, as presented, receives the careful consideration of the court. The rights of the litigants will thus be protected and safeguarded in the council chamber as well as in the court room.

It therefore appears that the system we propose to you establishes a permanent nucleus of the court; that each nation is, within the period chosen, represented within the court, and that each nation, in a larger or smaller degree, contributes to the judicial determination of the cases and to the development of international law; that each nation, whenever it appears as party plaintiff or defendant, may be represented in the court by a judge of its own appointment, whose duty it is to see that the arguments advanced by counsel receive that careful consideration which is to be expected from judges of character and attainment. The general interest which all nations have in the advancement of international law is thus secured, and the special interest which each litigant has in the outcome of a controversy is not overlooked.

We are conscious, however, that the plan we present to you, however correct or acceptable it may be in principle, and however satisfactory it may be in practice, is nevertheless open to criticism. We assure you, however, that the plan presented is not the result of a sudden inspiration, but is the product of careful, indeed painstaking, examination of the problem and the means by which it may be met and solved.

We feel that each State will consider itself entitled to greater consideration than is assigned to it, but we hope the system we propose is so reasonable as to prove acceptable,—at least in theory.

It will be noted that the table presented is based upon the juridical equality of all the States represented in or invited to the Conference, and that each State, therefore, has and must have the right to appoint a judge for the proposed court, even though the judges may serve in rotation and for shorter periods. In proposing that the judges appointed by Germany, the United States, Austria-

Hungary, France, Great Britain, Italy, Japan and Russia serve for the full period of the Convention, we do not lose sight of the juridical equality, but [609] recognize the fact that the greater population, industry and commerce of these States entitle them to a correspondingly greater, that is larger, participation in the court. It should be noted, however, that although the judges of these populous States would form a permanent nucleus, they do not constitute the quorum of the court.

It may well be that other and different combinations will be more satisfactory to the members of the committee. We present this plan for the composition of the court in the hope that it may at least serve as a basis for discussion and suggestion, even though it should not be acceptable in all its details.

Mr. Scott then reads the table of rotations as submitted to the committee.

Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Twelve Years.[1] [2]

Judges	Deputy Judges	Judges	Deputy Judges	Judges	Deputy Judges	Judges	Deputy Judges
First year		*Second year*		*Seventh year*		*Eighth year*	
1 Argentine Republic		Argentine Republic		Argentine Republic		Argentine Republic	
2 Belgium		Belgium		Belgium		Belgium	
3 Bolivia		China		China		China	
4 China		Colombia		Spain		Spain	
5 Spain		Spain		Honduras		Nicaragua	
6 Netherlands		Netherlands		Netherlands		Netherlands	
7 Roumania		Roumania		Roumania		Roumania	
8 Sweden		Sweden		Sweden		Sweden	
9 Turkey		Turkey		Turkey		Turkey	
Third year		*Fourth year*		[611] *Ninth year*		*Tenth year*	
1 Brazil		Brazil		Brazil		Brazil	
2 Chile		Chile		Chile		Chile	
3 Costa Rica		Cuba		Denmark		Denmark	
4 Denmark		Denmark		Spain		Greece	
5 Spain		Greece		Greece		Paraguay	
6 Greece		Netherlands		Panama		Netherlands	
7 Netherlands		Portugal		Netherlands		Portugal	
8 Portugal		Siam		Portugal		Siam	
9 Turkey		Turkey		Turkey		Turkey	
[610] *Fifth year*		*Sixth year*		*Eleventh year*		*Twelfth year*	
1 Dominican Republic		Bulgaria		Spain		Bulgaria	
2 Ecuador		Spain		Mexico		Spain	
3 Spain		Guatemala		Norway		Mexico	
4 Mexico		Haiti		Netherlands		Montenegro	
5 Norway		Luxemburg		Peru		Norway	
6 Netherlands		Mexico		Salvador		Persia	
7 Serbia		Norway		Serbia		Switzerland	
8 Switzerland		Persia		Switzerland		Uruguay	
9 Turkey		Switzerland		Turkey		Venezuela	

[1] [For the convenience of the reader this table, which covers practically three pages (609-11) of the original French text, has been slightly changed in form and greatly condensed in size.]

[2] See Annex 81.

[612]

TABLE SHOWING THE NUMBER OF YEARS IN EACH PERIOD OF TWELVE YEARS.

COUNTRIES	JUDGES	DEPUTIES	COUNTRIES	JUDGES	DEPUTIES
	Years			*Years*	
Spain	10	10	Bolivia	1	1
Netherlands	10	10	Colombia	1	1
Turkey	10	10	Costa Rica	1	1
			Cuba	1	1
Argentine	4	4	Dominican Republic	1	1
Belgium	4	4	Ecuador	1	1
Brazil	4	4	Guatemala	1	1
Chile	4	4	Haiti	1	1
China	4	4	Honduras	1	1
Denmark	4	4	Luxemburg	1	1
Greece	4	4	Montenegro	1	1
Mexico	4	4	Nicaragua	1	1
Norway	4	4	Panama	1	1
Portugal	4	4	Paraguay	1	1
Roumania	4	4	Peru	1	1
Sweden	4	4	Salvador	1	1
Switzerland	4	4	Uruguay	1	1
			Venezuela	1	1
Bulgaria	2	2			
Persia	2	2			
Serbia	2	2			
Siam	2	2			
	90	90		18	18

[613] Mr. **Kriege** is granted the floor to explain the rotation schedule as regards the deputy judges.

He states that the problem of deputy judges might be solved in different ways:

1. The right might be granted to each State to have its deputy judge recorded in the table alongside of its judge. In the two columns of the table containing the distribution of the judges and deputy judges the names of the same countries would be there recorded.

2. It might be possible that, instead of naming a judge and a deputy judge, certain countries would prefer to designate the same person to fulfill successively the two functions. Groups of countries might then reach an understanding so that, for instance, the judge of Belgium might also be the deputy judge of Switzerland, and that the judge of the latter Power might figure as deputy judge of Belgium.

3. It might also be possible to designate, even now, in the table those States whose judges, in given cases, should serve as deputy judges of other countries.

His Excellency Mr. **Ruy Barbosa** calls attention to the fact that the discussion of the rotation schedule has been taken up when it had been agreed that it should be taken up only forty-eight hours after the distribution of this article.

The **President** concurs in this remark; but he adds that until this moment the committee has complied faithfully with the method that has been approved: questions have been put and provisional explanations furnished, but the discussion of the table itself will not yet be proceeded with.

His Excellency Mr. **Lou Tseng-tsiang** would like to submit a reflection to the committee. It seems that the population has been taken as one of the bases of the apportionment of the Powers in the table. But it seems that

this element of judgment has been perhaps lost sight of as regards China.

Special record is entered concerning this observation of Mr. Lou Tseng-tsiang.

Paragraphs 2 and 3 of Article 7 give rise to no remarks.

ARTICLE 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

The **President** suggests that in case of a tie-vote the oldest of the judges should be entered as elected, instead of leaving the matter to lot drawing.

His Excellency Mr. **Martens** declares that latterly recourse has frequently been had to lot drawing, but that personally he would also prefer to leave the question to be settled by age.

Mr. **Eyre Crowe** proposes that the committee follow the system of seniority of nomination.

Mr. **Louis Renault** answers by saying that the notification of the nomination of the judges might bear the same dates.

The **President** thinks that age may be regarded as presumption of experience and the committee concurs in this view.

The phraseology of the close of Article 8 will, therefore, be modified accordingly.

[614] The President reads aloud Article 9.

ARTICLE 9

The judges of the International High Court of Justice shall receive during the years when they are called upon to sit an annual salary of . . . Netherland florins. This salary shall be paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

While the Court is sitting, or while they are carrying out the duties conferred upon them by this Convention, they shall be entitled to receive a monthly sum of . . . florins; they shall further receive a traveling allowance fixed in accordance with regulations existing in their own country.

The emoluments indicated above shall be paid through the International Bureau and borne by the signatory Powers in the proportion established for the Bureau of the Universal Postal Union.

With regard to paragraph 3, Mr. **Kriege** proposes to replace the words "in the proportion established for the Bureau of the Universal Union" by "in proportion to their participation in the designation of the judges."

The **President** desires to explain a point which to him seems doubtful: it seems to him that there are two elements in the salaries that shall be allotted to the judges; in the first place, they are to receive permanent and fixed honoraria for the duration of the period of their nomination and, in the second place, a special allowance during the sessions of the court. It seems that these salaries of the judges are not incompatible with the salaries which they may draw from their Governments for reasons that have nothing in common with the services which they render as members of the Permanent Court. Thus shall the Presi-

dent of a Court of Appeal forego his salary as such because he is nominated a member of the Court?

His Excellency Mr. **Martens,** along the same line of thought and before allowing the reading of the articles to proceed further, would submit to the committee a remark which is connected with the general question of the independence of the judges. Article 4 of the project obliges the judges to take oath before the administrative council. Does not such oath affect their independence? By mere way of a simple, personal indication his Excellency Mr. MARTENS suggests the following phrasing for the closing of Article 4:

> Before entering upon their duties, the judges must swear or make a solemn affirmation to exercise their functions impartially and upon their conscience.
>
> This solemnity shall be performed before the Ministers of Foreign Affairs and of Justice of the Netherlands and the members of the diplomatic corps accredited to the Royal Netherland Court.

Mr. **Kriege** replies by stating that the solution indicated in the project seems to him preferable. The administrative council represents the authority of the community of nations and the committee seems unanimous in believing that the oath is above all a matter of conscience with him who takes it.

Baron **d'Estournelles de Constant,** who resumes consideration of the matter of salary, believes it difficult to conciliate international independence which must be assured to the judges of the Hague Court with the incontestable national dependence which will result, so far as they are concerned, from the fact that in their country they exercise a function for which they receive remuneration.

His Excellency Baron **Marschall von Bieberstein** calls attention to the fact that very frequently a national judge who accepts a salary from his Government gives proof of his independence in condemning that same Government.

[615] Baron **d'Estournelles de Constant** replies by saying that we are not only dealing with the matter of salary but with the authority itself of the arbitrators. Will not a magistrate who occupies a high post in his country seem, rightly or wrongly, to be suspected of partiality as an international judge?

More than ever it is proper to quote the adage: "Cæsar's wife must be above suspicion."

His Excellency Baron **Marschall von Bieberstein** replies by saying that a judge has to concern himself only with considerations of right.

His Excellency Mr. **Mérey von Kapos-Mére** suggests the insertion of a provision declaring the judges irremovable, that is to say, that they may not be dismissed by their Governments.

His Excellency Baron **Marschall von Bieberstein** believes that they might be declared irremovable for the duration of their functions, save, of course, cases of incapacity resulting from illness, unworthiness, etc.

Mr. **Heinrich Lammasch** proposes that they be declared irremovable by reserving those cases that might subject them to dismissal according to their national legislations.

His Excellency Baron **Marschall von Bieberstein** is not opposed to the insertion of such a clause, although we are considering only an arbitral court.

The **President** states that the insertion of this clause is desirable because the arbitral court tends to lose something of its arbitral nature in becoming a

permanent court, and thus being rather like a real court. It must, therefore, be surrounded with guarantees.

The committee then passes on to the reading of Article 10.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

Mr. **de Beaufort** states that Article 10 deals with a very serious case; but an even graver case, that in which judges might be influenced by private individuals, has not been provided for. To obviate these eventualities he would prefer adding to the last paragraph of Article 4 a provision imposing upon the judges the oath not to accept any other remuneration except the one foreseen by this Convention.

Mr. **Kriege** believes, on the contrary, that Article 4, thus modified, would be much more offensive than Article 10.

The **President** reads aloud Article 11.

ARTICLE 11

The seat of the International High Court of Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The special committee (Article 6) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

His Excellency Mr. **Martens** states that Articles 6, 11, 17 and 18 refer to a special committee designated by the High Court. This special committee [616] will be competent for cases of summary arbitration. His Excellency Mr. MARTENS approves of the idea of a restricted tribunal which is met with in the Russian project. He protests, however, against its denomination of *committee;* he believes that this name is met with in no State, with the exception of Great Britain, to designate an assembly with judicial functions.

Mr. **Louis Renault** is not partial to the name, but the idea is a good one. As for him, the essential thing will be that this committee fulfill the expeditious but very important duties which in internal judicial organization devolve upon the presidents of tribunals.

The **President** declares that from the remarks that have just been exchanged, it is evident that paragraph 2 of Article 11 is lacking in precision.

Articles 12 and 13 give rise to no remarks.

ARTICLE 12

The Administrative Council is charged, with regard to the International High Court of Justice, with the same functions that it fulfills under the Convention of July 29, 1899, as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau of the Permanent Court of Arbitration acts as registry to the International High Court of Justice. It has charge of the archives and carries out the administrative work.

ARTICLE 14

The High Court shall meet in session once and, if necessary, twice a year. The sessions shall open the third Wednesday in July and the third Wednesday in January, and shall last until all the business on the agenda has been transacted.

The sessions shall not take place if the special committee decides that business does not require it.

His Excellency Mr. **Asser** calls attention to the fact that in all probability the number of cases coming before the High Court itself will not be very large and that the greater part of the work will devolve upon the special committee.

It seems to him, therefore, needless to call the High Court into session more than once in the course of a year.

He also believes that it would be best not to insert into the Convention the exact dates when the sessions are to take place.

His Excellency Mr. **Alberto d'Oliveira** thinks upon this matter as his Excellency Mr. ASSER: that an annual session would be sufficient. He believes, moreover, that it would be well to specify somewhat as to what the court shall do during this annual session should it have no cases to decide.

Might it not be well to entrust to the court the gradual codification of international jurisprudence? It is very important that the judges do not get out of touch with one another while the court is not in session. It would, so to say, be necessary that they should not lose the feeling of their quality as judges of the High Court. It would perhaps even be useful to call together from time to time, every five or six years, plenary assemblies in which all the signatory Powers would be represented.

The **President** believes that the right of convoking extraordinary meetings might be granted to the special committee.

Mr. **Kriege** does not in any way object to the proposition of his Excellency Mr. ASSER. A certain latitude might be allowed the committee.

[617] His Excellency Baron **Marschall von Bieberstein** asks his Excellency Mr. ALBERTO D'OLIVEIRA what would be the functions of the judges called into extraordinary assembly.

His Excellency Mr. **Alberto d'Oliveira** replies by saying that such meetings might, in the first place, serve the good purpose of having the judges get acquainted with one another; in the next place they might lead to very useful exchanges of views concerning matters of international law. The judges are also jurists, and it is especially as jurists that it is necessary to put them into contact with one another.

The meetings would not have to be public.

His Excellency Baron **Marschall von Bieberstein** sees a serious danger in such periodical plenary meetings of all the judges, which would in a short time transform the High Court into a sort of international judicial parliament. It will certainly happen that members of the court who have expressed certain theories in these deliberative assemblies will be subsequently called upon to pronounce themselves as judges upon these same matters.

His Excellency Sir **Edward Fry** concurs in the views expressed by their Excellencies Baron MARSCHALL and Mr. MARTENS, concerning the danger of initiating among the judges discussions of a theoretical and academic nature.

His Excellency Mr. **Alberto d'Oliveira** states that he does in no way mean

to suggest the establishment of a judicial parliament. He continues, however, in believing that periodical meetings of the judges would always prove useful, even though they were used merely in reading the reports of the court, in settling questions upon regulations and procedure, etc.; thus a bond of solidarity would be created between all these members.

His Excellency Mr. **Asser** is not unaware of the dangers to which Baron Marschall has just called attention. He believes, however, that the meetings of the judges would be useful even though they led to nothing more than mutual acquaintance. But Articles 23 and 24 which deal with this matter seem to give sufficient satisfaction to Mr. d'Oliveira, since the court itself establishes its regulation for internal organization and may even suggest modifications to the Convention that shall have created it.

Mr. **Heinrich Lammasch** thinks that it is a very delicate matter to express oneself upon a theoretical question if this question is subsequently to be put into practice. To incite judges to discussion means to lead them to indulge in criticism; let us not confuse deliberations with perilous discussions.

His Excellency Mr. **Choate** would have the High Court operate as such, meeting every year to engage in work and not in discussion. He is opposed to this transformation into an academy, in virtue of the rather absolute axiom: "the more one talks, the less one thinks," or of this other one: "to indulge too much in talk is harmful."

Mr. **Kriege**, even as his Excellency Mr. Asser, states that Articles 23 and 24 give sufficient rights to the High Court.

Article 15 is then read aloud.

Article 15

(Provisions respecting the relations of the International High Court of Justice with the International Prize Court, especially as regards holding office as judge in both Courts.)

Mr. **Kriege** asks the committee to await the completion of the work relative to the Prize Court.

It is so decided.

The meeting closes.

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THIRD MEETING

AUGUST 20, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4:25 o'clock.

His Excellency Mr. **Ruy Barbosa** presents the following declaration:

With extreme interest the Brazilian Government has followed the question which is to be discussed to-day ever since its solution through the system of rotation in the composition of the international Court of Arbitration has been announced. It is a system which would be the proclamation of the inequality of national sovereignties by the very nations which it degrades; and, our Government, regretting to see these rumors confirmed, has given us the most formal instructions to oppose it by not subscribing to any combination which may not rest on the equality between the States. It believes that, in agreement with this principle, it would be much easier to reach a practical result without having recourse to the complicated and artificial apparatus of the project under discussion, which, beginning with an arbitrary idea, does not even observe justice in its application.

Public opinion in our country, according to telegrams which I received recently, has manifested itself in a manner which, although we ourselves may think otherwise, would not permit us to take any other attitude, or to abstain altogether from discussing it. But, it must be stated that our judgment and our deliberation have been reached in advance of this movement which takes a pronounced form in the daily press of our nation.

It is, therefore, in obedience to our own conviction, in obedience to the orders of our Government and to the expressed feeling of our country that we are going to formulate in your presence these declarations and to submit to you, in favor of the principle of the equality of States consecrated in the Convention of 1899, a number of bases for another project.[1]

Considering that to fix at the outset upon an arbitrary number of judges for the Permanent Court of Arbitration, according to a certain idea assumed *a priori* as to the magnitude of this number, in order to attempt to accommodate to it thereafter the representation of all the States, is to reverse the necessary and inevitable terms of the question;

Considering that this inversion is the less justifiable when the precise number of States to be represented in the Court is known and a different number less than that is adopted for their representation;

[619] Considering that by transposing in this manner the unalterable terms of

[1] Annex 83.

the problem it is presumed arbitrarily to assign to the different States unequal representations in this international Court;

Considering that in the Convention for the pacific settlement of international disputes celebrated at The Hague, July 29, 1899, the signatory Powers, among which were all those of Europe as well as the United States of America, Mexico, China, and Japan, agreed that the contracting States, without regard to their importance, should all have an equal representation in the Permanent Court of Arbitration;

Considering that in the adoption of this basis they have not only performed a voluntary act but also admitted a principle which it was not possible for them to overlook in the composition of an international body created for the purpose of deciding the differences between independent and sovereign States;

Considering therefore that this principle, inevitable in every other organization of a like nature, with greater reason imposes itself in a manner especially imperative when the question is that of establishing the definitive institution in which States place their highest confidence for the judicial settlement of their disputes;

Considering, consequently, that in the projected Court the quality of all the signatory States cannot be passed over which would be created by assigning to each the right to an entire and permanent representation in the body;

Considering that no Government could, even if it wished, renounce this right, which touches the sovereignty and consequently the independence of the States in their mutual relations;

Considering that this principle is not observed by permitting each State to appoint a member for the Court if he is to sit only for a certain number of years, scattered variously among the different States according to a scale of importance which has nothing to do with the subject and which, noticeably partial in favor of certain European countries, does not correspond to the obvious reality of the facts;

Considering that it is clearly sophistical to pretend that in this way the equality of States as sovereign units in public international law is satisfied, and that there is no attack upon this right by subjecting it to mere conditions of exercise;

Considering that a right equal among all those possessing it is not subjected to simple conditions of exercise when some are restricted to periods more or less limited while others have the privilege of a continuous exercise thereof;

Considering therefore that it is necessary to maintain, for the Court in question, the same rule of continuous equality of representation of States consecrated in the Convention of 1899;

Considering that if the States excluded from the First Peace Conference have been invited to the Second, it is not with a view to having them solemnly sign an act derogatory to their sovereignty by reducing them to a scale of classification which the more powerful nations would like to have recognized;

Considering that the interests of peace are not served by creating among States through a contractual stipulation categories of sovereignty that humiliate some to the profit of others, by sapping the bases of the existence of all, and by

proclaiming with a strange lack of logic the legal predominance of might over right;

Considering that if the new Court is to be set upon such foundations it is better not to create it, the more so because for the pacific settlement of
[620] international disputes the nations have at their disposal the present Court as well as the right which this Conference recognizes in them, and which it could not deny them, to have recourse to other arbitrators;

Considering that with this right admitted there is no advantage in having two courts alongside of each other and equally considered as permanent;

Considering that if the capital difficulty complained of in the present Court is a lack of true permanence, it would be much more practical and useful to give it permanence by correcting this curable imperfection than to undertake this duplication of the Arbitral Court;

Considering that it is not possible to reach such a desideratum by utilizing the elements of the present Court to submit it to a reform which gives it a different consistence and at the same time a real permanence;

Considering that in order to procure for it permanence it is by no means necessary that all its members reside at the seat of the Court, at whose plenary sessions a quorum should rather be very small, for example, a quarter of the whole number of judges appointed; by stipulating for this number of members, by rota, the duty of residing at any point in Europe whence they can arrive at The Hague in twenty-four hours when summoned;

Considering that on this basis we should decide on the number of fifteen judges, or even less, which would be far preferable if the total number of judges were inferior to that of the number of signatory States;

Considering, in short, conformably to the rules accepted in the first Convention of 1899, that the signatory Powers should be recognized as having the power to come to an understanding for a common designation of one or more members, and besides, of permitting the representative already appointed by one State to be chosen by others;

Considering, moreover, that the right of representation on the Court would be voluntary, like all rights in their exercise, that certain States probably would abstain therefrom, and that besides in order to exercise it, it would be necessary previously to offer secure pledges for the accomplishment of the duty of paying the expenses of the judge appointed;

Considering that in this way we might arrive, for the plenary sessions of the Court, at an actual body less numerous even than that resulting from the combination provided by the Anglo-German-American draft;

Considering that by this reduction in the ordinary quorum the functions of the Court would gain, not only in facility and dispatch, but also in completeness and efficiency, for in judicial bodies that are too numerous in their membership there is always a sad tendency among their members to rely upon one another, which fact results in reducing to a very small minority those who work, study, and do their duty with full information of the case;

Considering, furthermore, that even this quorum would only have to act in certain cases, when the interested parties required it, or when there might be

certain difficulties to solve, for, in pursuance of the very essence of arbitration, whose character should not be denatured, it would be necessary to assure to the parties engaged in the dispute the right of electing from the number of the Court the judge or the judges to whom they agree to submit the settlement of their controversy;

The delegation of Brazil, in accordance with the most precise instructions of its Government, cannot acquiesce in the proposal under discussion, and permits itself to offer the following bases for the organization of another project:

I. For the constitution of the new Permanent Court of Arbitration each Power shall designate, under the conditions stipulated in the Convention
[621] of 1899, a person able to discharge worthily as a member of that institution the duties of arbitrator.

It shall also have the right to appoint a deputy.

Two or more Powers may agree upon the designation in common of their representatives on the court.

The same person may be designated by different Powers.

The signatory Powers shall choose, so far as they can, their representatives in the new court from those composing the existing court.

II. When the new court is organized the present court shall cease to exist.

III. The persons appointed shall serve for nine years and cannot be displaced save in cases where, according to the legislation of the respective country, permanent magistrates lose office.

IV. A Power may exercise its right of appointment only by engaging to pay the honorarium of the judge that it is to designate, and by making the deposit thereof every year in advance on the conditions fixed by the Convention.

V. In order that the court may deliberate in plenary session, at least a quarter of the members appointed must be present.

In order to ensure this possibility the members appointed shall be divided into three groups according to the alphabetical order of the signatures to the Convention.

The judges included in each of these groups shall sit in rotation for three years, during which they shall be obliged to fix their residence at a point whence they can reach The Hague within twenty-four hours on telegraphic summons.

However, all members of the court have the right, if they wish it, of sitting always in the plenary sessions, even though they do not belong to the group especially called to sit.

VI. The parties in dispute are free either to submit their controversy to the full court or to choose from the court, to settle their difference, the number of judges that they agree upon.

VII. The court will be convened in plenary session when it has to pass judgment on disputes the settlement of which has been entrusted to it by the parties, or, in a matter submitted by them to a smaller number of arbitrators, when the latter appeal to the full court for the purpose of settling a question arising among them during the trial of the case.

VIII. In order to complete the organization of the court on these bases everything in the provisions of the draft of England, Germany, and the United States shall be adopted that is consistent therewith and seems proper to adopt.

[622] Mr. President, this is our proposition.

We lay it before you in order to define our attitude and our ideas in a matter of the highest moral and political importance for the American peoples, as well as for those of Europe who have no large fleets and powerful armies available. It is our object to show that we do not desire to destroy, but to collaborate.

Nevertheless, it raises a preliminary question to which answer must be made before taking cognizance of the work which I am submitting to you, as well as of the Anglo-Germano-American project to which we reluctantly oppose ours.

It is the question of your competence.

What is our mandate as a committee of examination? It is, while we are examining the propositions referred to us, to put into practice the principles which have been discussed and adopted in the Commission.

But the Anglo-Germano-American proposition is based upon a principle with which the Commission is absolutely unacquainted: the principle of rotation, that is to say, the principle of inequality of the States in the Arbitral Court.

This principle which now arises for the first time in international law overthrows and entirely changes that of the equality of the States established in the Convention now in force.

Therefore the Commission, in the mandate with which it has entrusted us, presupposed the maintenance of that principle, or to say the least, did not authorize us to adopt the contrary principle of which it had not been given the slightest indication.

The importance of the principle formulated by the First Peace Conference in the first establishment of arbitration is of the highest importance, not simply with regard to international arbitration, but also for the entire public international law. It affects the sovereignty of the States. If the States consent to be despoiled of their sovereignty, very well and good. It is for them to attend to such a matter. But they must know what is being done in their name, in a matter which implicates their most fundamental right; they should in the first place direct us, by means of their competent commission, to examine this important innovation.

Therefore, as soon as this discussion is proposed, reference to the Commission becomes inevitably necessary.

It must pronounce itself between the principle of the Convention of 1899 concerning the equality of the States, and that of the proposition in discussion which would decree their inequality.

After it shall have thus pronounced itself, then shall come our turn to continue the examination of the subject.

In consequence, I propose that the committee should adjourn the discussion upon the principle until the First Commission shall have declared itself by maintaining the principle in force, or by abandoning it, and that to that end you should refer to it the question of the principle involved.

By reason of the importance of the proposition of his Excellency Mr. Ruy Barbosa, the **President** believes that it cannot be discussed until it shall have been printed and distributed.

As regards the preliminary question raised by Mr. Ruy Barbosa with regard to the competence of the committee, the President believes that it would

be difficult to separate it from the proposition itself and to discuss it presently.

His Excellency Mr. **Ruy Barbosa** does not insist, but calls attention to the fact that his motion concerns the problem of the equality of the States and that the preliminary question of the competence of the committee becomes, as a result, an important matter.

[623] His Excellency Mr. **Nelidow** is of opinion that the committee has declared itself competent by the very fact that for some days past it began the examination of the project.

His Excellency Mr. **Beldiman** shares to a certain extent the opinion expressed by Mr. BARBOSA concerning the matter of competence. It is quite evident that the committee is competent because it received a mandate to that effect from the subcommission, but, on the other hand, Mr. BARBOSA is not in the wrong. When the subcommission decided to entrust to the committee of examination the study of the organization of the High Court, the proposition which was distributed Saturday last was unknown to it. The essential part of it, that is to say, the apportionment of the judges, was reserved. This fact led to several of the abstentions recorded at the time of the vote of the subcommission upon this matter. His Excellency Mr. BELDIMAN is of opinion that now it would be proper to lay before the Commission the proposition with which it was not acquainted and to secure its opinion with regard to this matter. It is an important question of principle; it is a new question which has arisen.

There are other considerations in favor of a reference of the matter. Several members of the committee desiring to enable their colleagues to bring the project to the knowledge of their Governments have not hesitated in taking this step. Moreover, the daily press has had knowledge of the proposition which has already been published. Furthermore, if it were to be decided to distribute even now the project to the entire Commission, this would but hasten the labors of the Conference and meet the views recently expressed by Mr. CHOATE. In short, I do not ask that the committee should relinquish the project, but I desire that the Commission should not any longer be left in ignorance of it.

His Excellency Sir **Edward Fry** believes that the committee is not competent to examine an entirely new project and he advocates its reference.

His Excellency Baron **Marschall von Bieberstein** does not share the view expressed by his Excellency Mr. BELDIMAN. He shows that even in the American proposition, with which the subcommission was acquainted at the time of the organization of the committee, it was stated that the judges would be chosen in such a manner as to represent the various legal systems and the different languages. The subcommission was, therefore, amply informed; it acted with full knowledge of the matter; and very validly it commissioned the committee to elaborate and to present to it a project along the line of ideas such as had been submitted to it.

His Excellency Mr. **Martens** approves of the view expressed by Baron MARSCHALL. In his opinion, the committee may regard itself as absolutely competent. This would be but following the same procedure that had been adopted by the Conference in 1899. At that time the committee charged with the study of arbitration had several projects before it. It made a choice. This having been done, it presented a definitive proposition to the Commission. His Excellency Mr. MARTENS believes that there can be no doubt as regards the competence of the committee.

His Excellency Mr. **Choate** expresses his opinion: first, with regard to the matter of competency; secondly, with regard to the question of the equality of States.

First, as to competence, he believes that the Commission and the subcommission meant, no doubt, to instruct the committee to examine the question and, if possible, to find a solution of the problem. According to Mr. CHOATE the judgment of the subcommission alone should be accepted in case the committee were unable to reach an agreement. He regards the committee not merely as competent, but as exclusively competent. As to the second point, that is to say, concerning the principle adopted by the authors of the project, his Excellency Mr. CHOATE, in answer to the discourse of Mr. BARBOSA, desires to state
[624] that this principle has been the principle of the absolute equality of the nations. The proposition assures to each Power the right to appoint a judge. It is true that all the Powers could not be represented in the court during the entire period of twelve years, but if this fact were to be regarded as affecting injuriously the sovereignty of the States, the establishment of the court would be made impossible.

Moreover, any Power that might be a party to a dispute, shall, according to the amendment of Baron MARSCHALL, have in every case the right of being represented by a judge in the court.

His Excellency Mr. CHOATE, in consequence, proposes to continue the examination of the project, and then to study the tables of distribution and, in the third place, to take up the discussion of the proposition of Mr. BARBOSA.

Mr. **James Brown Scott** desires to state that the project of the apportionment of the judges was established upon the principle ot absolute equality and that this fact cannot be overlooked. As it was impossible to organize a court of forty-six judges, it was indeed necessary to resort to a system of rotation.

His Excellency Mr. **Ruy Barbosa**: I do not desire to insist, for I see the disposition of the majority of our colleagues from the manifestations that we have just heard. The committee will declare itself competent. It will not take my objection into account. My insistence, therefore, will lead to no results. Nevertheless, I must answer the objections that have been presented, so that no one may conclude that I am yielding to them, or that I have been impressed by them.

No, Mr. President, that which has just been raised in objection to my preliminary question, impresses me only as a practical proof of the uselessness even of evidence for the clearest and most just minds, when a mental preoccupation seizes upon them and obscures their vision. I am going to prove this, Mr. President.

In the first place, I shall answer to his Excellency the President of the Conference, Mr. NELIDOW, who has honored me with a precise statement. To his mind, the committee has already passed upon its competence in view of the fact that, for some days already, it has been busy with the disputed project without seeing in it anything of a nature that might have made it hesitate to proceed with its examination. Implicitly, therefore, it has recognized itself as not incompetent.

But my illustrious objector is palpably mistaken. It is true that during some past meetings the committee has proceeded with the examination of the project, but it has not prosecuted this examination from the point of view

which we are now discussing. Upon this particular point it has withheld discussion intentionally ever since taking up the project by declaring that the article concerning the system of the composition of the new court of arbitration should not be discussed until after the table referred to had been presented, owing to the inadequacy of the text of the proposition. But it was two weeks before this table was laid before us. In the meantime the committee proceeded with the analysis of the proposition by ridding the text of the other articles of its difficulties; but the particular article just referred to has never been examined.

It is, therefore, quite clear that the committee has never had the opportunity of examining the question of its competence, which presents itself only at this time. Therefore, it is high time that we object to the refusal to look into this matter.

As an eye witness I know nothing of that which took place in the First Conference of 1899. Mr. MARTENS was kind enough to recall it to our minds. According to his testimony—and I have no reason for impugning this testimony—no limits were set to the competence of the committees in those days. It was permitted to bring up important questions of principle within the committee itself, although such principles might have been unknown to the Commission which had appointed the committee, and it was, furthermore, permitted to settle such principles then and there; the innovations resulting from such action were not considered in the Commissions as of illegitimate origin.

[625] But because such were the rules in 1899, it does not follow that the rules must be the same in 1907. The régime of all human institutions evolves with their internal development. The purely embryonic rules which the Conference followed in its cradle, do not hold for other and later stages of its life. In the First Peace Conference experience had to be gained. Its acts were acts of first intention. Time pressed for action. The work was heavy. In the necessity of terminating at as early a date as possible a task which had never been imposed upon any other human assembly, an effort was made to bring this about as soon as possible and with the least possible harm. But we, on the contrary, are in possession of this experience of our predecessors so that we are able to distinguish between that which is good and that which is evil, and to separate that which is useful from that which is harmful.

It should be added that the Conference of 1899 was confronted with international law as with an immense agglomeration of ideas for the most part abstract, theoretical, as they are met in theory, or in scattered precedents, as they appear in the events of the day or in international treaties. Then from the bottom of this mass in elaboration, a mass inconsistent and contradictory, the Conference adopted certain most urgent, wide-reaching and fundamental notions, notions most universally accepted, and made consecrated standards of them. The standard of the equality of the States in the constitution of the arbitration court common to all the nations, is among their number. It is included in the Convention of 1899 which assigns to each State a place equal to that of all the rest. The proposition now under discussion aims to substitute for this principle the one of inequality between the States. But are we competent to deliberate upon this formal revocation of the work of 1899? We are not the Conference, nor even the Commission, but merely a committee, that

is to say the third degree in the legislative authority of the great assembly, to which has been entrusted a work of secondary execution.

Even greater effort has been made to bring me around to the other point of view by seeking to convince us that reference of the project to the Commission would be useless, because the Commission, in taking cognizance of the text of the proposition as it has been submitted to it, found the principle of inequality to which opposition is now made already discussed in its Article 5. But the question has not been brought up. The disastrous principle which I am combating was already indicated—I can clearly see—in the tenor of the proposition. But the haste and hurry, if I be permitted to say so, with which it was proposed to refer the whole matter at once from the Commission to the committee, did not leave sufficient time for the former to examine all that which was contained in so large and complex a machinery, the component parts of which were scattered in such a large number of articles.

And the proof, gentlemen, that it was not desired to make known the system of the proposition regarding this matter is found in the long list of abstentions recorded precisely on the statement of ignorance in which the Commission found itself with regard to the purposes of this semi-veiled plan. That is the fact. And this fact surely ought to outweigh our own personal appreciations no matter what they may be.

We now come to the objections of Mr. Choate and Mr. Scott. Manifestly they are in advance of the examination of the proposition. But in view of the fact that these opinions have been expressed, they must be answered. According to our eminent colleagues their project does not contravene the equality of right between the nations, provided that all should have the right to appoint a member of the court. If such a member acts only during a part of the total number of years, this is hardly a condition of exercise, which does not affect the right itself, for all rights are more or less subordinated to the conditions of necessary exercise.

[626] This, Mr. President, is the most extraordinary confusion that I have ever heard of as between two juridical ideas well within the comprehension of any one. To be sure, once we decide to submit to conditions of exercise, which are the same for all the subjects of a right, the equality of these subjects is not affected. But, is it this which comes to pass in the hypothesis in question? Not at all.

The project in question gives to all the States alike the right to appoint one of the members of the court. But this member, after he shall have been appointed, will, with respect to certain States, have the right to sit only for a shorter or longer period of time, whilst for other States, the member appointed will act during the course of the entire period.

Let us be plain and exact. The total extent of the period fixed is twelve years. During this period the representatives of a certain number of States would be sitting always, that is to say during the twelve years; others during ten years; others again during four years; and still others during two years; and finally, some at most during one year. The first class relates to eight Powers, the second to three Powers, the third which includes Brazil, to thirteen, the fourth to four and the fifth to eighteen others. For eight nations which shall have representation in the court during the entire period, there are eighteen who are to be represented in the court during fractions of that time only. There

are men here who dare say that those condemned to receive only a more or less small fraction of the total period enjoy the same right as those to whom is given the privilege of the entire period.

Spain with ten years of service, Mexico or Brazil with four, Serbia with two, Bolivia with only one, enjoy a right equal to that of Great Britain, Germany, or the United States with twelve years of service. Is there any sense to this? But if we can reduce the enjoyment of this right to one of the twelve years without diminishing the substance, it might be possible to reduce the twelve months of this sole year without injuriously affecting that right. If the services were reduced to six months or to three months, to one month, it is only the service that would be affected. Why not reduce that service to a few weeks? The right would not in any way be affected. Three weeks, one week, even one day of service, why we are only dealing with the conditions of the exercise of this service. The immunity of the right would not suffer by it. With Russia or Japan sitting in the court for the twelve years, those small American countries, cut down to an actual presence of twenty-four hours in the arbitral court, could not complain. The right is invariable with regard to all, since each appoints a judge, although my judge might have but one day of authority, whilst your judge will have effective authority during twelve years.

This makes the situation clear, I believe. If, perforce, we insist upon referring to this condition of things as conditions of exercise, it will certainly be necessary to confess that there are conditions of exercise that may affect the very existence of the right and annul that right.

The conditions of exercise respect the equality of right only when they are *equal* for all those possessing that right. On the other hand, inequality in the exercise implies inequality in the right itself, for the value of a right can be measured only by the juridical possibility of exercising it.

And to bring to a close what I have desired to state, let us make a distinction as we should have done in the beginning, so that all doubt about this matter may be settled. The proposition contains two distincts rights: the right to appoint and the right to sit. In the right of appointing we would indeed be equals. But in the right of sitting in the court we would be absolutely unequals. And it is this inequality which violates the equality of the States.

This is the reason why I brought up the question of competence which to my conscience, as a member of this committee, seems evident. We have no written regulations enabling us to define precisely the limits of our powers.
[627] But in case of doubt, as in this present case, scrupulousness, it seems to me, would demand that we should be guided by the decision of our constituents and refer the question to the Commission.

Gentlemen, I bring my words to a close by requesting you to pardon me for the vivacity of my words and the warmth of my feelings. This is due to the excitability of my temperament and prompted by the sincerity of my convictions. I do not desire to put any obstructions in the path of our labors. But neither can I relinquish the performance of my duty.

The **President** states that he had thought best not to interrupt this preliminary discussion. When the time comes for taking up the examination of the table of apportionment, then the committee will take into account the objections expressed by Mr. Barbosa. In the meantime, however, it will be necessary to adopt the best possible method to carry the labors of the committee to a suc-

cessful ending; the most practical way would be to read aloud the articles of the project agreed to by the three Powers.

The PRESIDENT now reminds the members of the fact that the precedents of 1899 are a guarantee for putting at their ease those of the members of the committee who might entertain doubts as to its competence. Furthermore, we are not to decide questions as they are settled in a parliament by a majority for or against; we are concerned, above all, with an examination and a study of the most difficult problems which the Commission whose membership was too large, has turned over to a special committee. The task of this committee consists in indicating the solutions, the possible means of conciliation, and not to take any *ne varietur* decisions. And, if in the course of its discussions the committee should reach the conviction that, contrary to the opinion of its authors, the proposition of the three Powers should violate the principle of equality, it will in such case not fail to advise with the subcommission.

It being a fact that the American proposition had foreseen a number of judges less than forty-seven, it is evident that by that fact alone, and while giving mandate to the committee to find a solution of the problem, the subcommission must have necessarily concluded that there would have to be an apportionment, and that the difficulty with which the committee would be confronted would have to be foreseen.

Furthermore, if the committee does not present a specified and precise text to the subcommission, the matter will again be referred to it. The President, therefore, much desires that Mr. BARBOSA should offer no further opposition so that it may continue the study of the question along the lines indicated by the PRESIDENT, and to that effect he appeals to the spirit of conciliation of the first delegate from Brazil.

Mr. BARBOSA has done nothing but avail himself of a legitimate right in delivering with great eloquence the discourse to which we have just listened. His words will be an additional guarantee that the interest of all the Powers shall be safeguarded.

But there is a second point in the discourses pronounced by Messrs. BARBOSA and BELDIMAN which engrosses the mind of the PRESIDENT. The project and the tables submitted to the committee by the three delegations have not been brought to the knowledge of the subcommission. Still, there is no secret about them; no secret could in fact have existed about this project and the tables; no one of us expects from anyone among us that there should be mystery about the object of our daily discussions; the daily press has published the propositions; the PRESIDENT would like to know if the committee thinks it improper to have the project and the tables distributed to all the members of the subcommission. The latter would thus be enabled to demand even now instructions from their Governments, and this would but hasten the labors of the Commission in permitting it to prosecute them alongside of those of the committee.

Mr. **James Brown Scott** desires to call attention to the fact that the tables contain nothing but provisional suggestions intended as bases for the studies of the committee. The authors will be glad to discuss amendments to these propositions; a result of this collaboration will finally have to be regarded as the proposition of the committee.

[628] The **President** declares that it is, of course, understood that the proposed tables form but a preliminary basis and not a definitive and complete project.

His Excellency Baron **Marschall von Bieberstein** does not regard it as improper to distribute the project and the accompanying tables provided that the German proposition regarding Article 5 is published at the same time.

The **President** finds that the distribution has been accepted in principle, but he would like to know in what form the project should be published: in its original form or in the form as at present modified.

His Excellency Mr. **Choate** believes that inasmuch as the committee concludes to distribute the project and the accompanying tables, it would be desirable to distribute all the propositions already presented or to be presented concerning the project of a permanent court.

After an exchange of views, the committee decides to distribute the project in the modified form.

The **President** reads aloud Article 16 of the project.[1]

ARTICLE 16

The High International Court of Justice shall be competent:

1. To deal with all cases of arbitration which, by virtue of a general treaty concluded before the ratification of this Convention, would be submitted to the Permanent Court of Arbitration unless one of the parties objects thereto.

2. To deal with all cases of arbitration which, in virtue of a general treaty or special agreement, are submitted to it.

Proposal of the Delegations of Germany and the United States of America

3. To revise awards of tribunals of arbitration and reports of commissions of inquiry, as well as to fix the rights and duties flowing therefrom, in all cases where, in virtue of a general treaty or special agreement, the parties address the High Court for this purpose.

Mr. **Guido Fusinato** observes that paragraph 1 of Article 16 creates a presumption in favor of the new court. He is of the opinion that a convention could not be modified without the consent of the parties. It is not enough to grant the parties the right to object. It would therefore be desirable to add to the paragraph the proviso that it would be "with the express assent of the parties." But if so modified paragraph 1 becomes useless as the case contemplated by it is already provided for in paragraph 2 of the same article.

As to paragraph 3 of the article, Mr. GUIDO FUSINATO remarks that, as a rule, revision can only take place before the judge who has pronounced the sentence. The recourse contemplated in paragraph 3 does not constitute a revision but a judgment on appeal or annulment. If the parties agree to resort to the new court under the conditions set forth in paragraph 3, they may do so. This case comes within the general provision of paragraph 2, and paragraph 3 should therefore be suppressed.

His Excellency Sir **Edward Fry** asks for a precise indication under paragraph 3 that the decisions of the old Permanent Court shall be accepted on the same basis as the rest. If not, preeminence would be given to the new High Court over the old court: such inequality must be avoided at all events.

[629] His Excellency Mr. **Martens** approves of the remarks of Mr. FUSINATO. He puts a question regarding the meaning of the words "general treaty." He suggests further to write "*should be submitted*" instead of "*are submitted.*"

[1] Annex 80.

He expresses finally and once more his fear that as a result of the phraseology of paragraph 3 the revision of arbitral sentences may become a customary thing, when up to the present time this has rarely been practiced.

Mr. **Kriege** replies to the question put by his Excellency Mr. MARTENS. The expression "general treaty" means "general obligatory arbitration treaty between States." For those cases when such a treaty concluded before the going into force of the proposed convention should declare the Permanent Hague Court competent to settle disputes that might arise, the project means to give a preference to the new High Court. But all freedom of action would be left to the parties if they desired to do otherwise and each of them would be entitled to oppose the application of this provision.

Mr. **Louis Renault** would like to submit some remarks with regard to Article 16. On the whole, he agrees with Mr. FUSINATO. If the permanent court is created there will be rivalry between it and the old court: it is understood that there shall be no preeminence established as to the one over the other. Full freedom of action must be left to the parties. The new court cannot rise superior to that of 1899 except through its own merits and advantages.

As regards paragraph 3, the phraseology of it must be carefully attended to: reference is made in it to a possible revision *of the report* of a commission of inquiry. It seems surprising that such a revision should be asked for and that, to that end, recourse should be had to a court. The report is not a decision. It is a record of facts, and it seems difficult, in this matter, to put a so-called machinery of revision into motion.

I believe, therefore, that this Article 16 stands in need of being reworded.

Mr. **James Brown Scott**: As proposed by Mr. FUSINATO, paragraphs 1 and 2 may be combined; the essential thing is that all depend on the clearly expressed will of the parties. It is quite possible that there may be reports establishing facts leading to responsibilities: at all events it is incumbent upon the parties to make the new court explicitly either competent or not competent.

Mr. **Kriege** finds the remark of Mr. LOUIS RENAULT quite to the point. The phraseology may be defective. What we have desired is that if the two parties find that the report of a commission of inquiry is not acceptable, they may address themselves to the court to have another report drawn up.

His Excellency Mr. **Asser** defends paragraph 1 which has been found fault with by Mr. FUSINATO.

His Excellency Sir **Edward Fry** believes that it would be sufficient to preserve paragraph 2 by omitting the word "*general*" before the word "*treaty*." This is what, in fact, Mr. FUSINATO has proposed.

His Excellency Mr. **Martens** demands that it be specified who is to make the revision.

Messrs. **James Brown Scott** and **Kriege** state that all depends on the will of the parties. The High Court is competent only in virtue of an agreement.

His Excellency Mr. **Martens**: I have taken part in about ten arbitration cases. The matter of revision has never arisen. With this paragraph it will become an habitual régime for international relations. This would be a veritable calamity for the development of arbitration, and I have the honor to insist upon the omission of paragraph 3.

[630] The **President** states the principle which controls the matter; it is the court which has rendered the decision which must be entrusted with the revision.

His Excellency Sir **Edward Fry** at all events opposes recourse of the Permanent Court to the High Court.

Mr. **Kriege** does not perceive the dangers of such a procedure if by common agreement the parties consent to it.

The **President**: The sentiment by which all of us are animated is not to include anything in the Convention that might *injuriously affect* the position of the old permanent court which has won the confidence of all the nations and which has already stood the test. Sir EDWARD FRY has well expressed this idea in the plenary meeting of the subcommission when he stated: If one of the two jurisdictions is to rise superior to the other, it will be in consequence of the services it shall have rendered.

As a conclusion, we must, therefore, refrain from putting into Article 16 a sort of presumption or of preference in favor of the new court.

His Excellency Mr. **Asser** reminds the members of the fact that the machinery for revision is already provided for by Article 55 of the Convention of 1899.

Mr. **Kriege**: According to Article 55 of the Convention of 1899, the same tribunal which has rendered the decision that is attacked is called upon to revise it. But by reason of death or prevention of arbitrators the parties may be unable to appeal to that tribunal. We may also imagine the case when the parties may prefer to entrust the revision to other arbitrators than those who acted in the first instance and who in a certain sense might be compelled to reverse their decision. In view of these cases and upon the condition of an agreement between the parties, paragraph 3 of Article 16 establishes the competence of the new court to effect the revision. It is, of course, understood that the right guaranteed by Article 55 shall remain complete.

His Excellency Mr. **Choate** believes himself warranted in alluding to a conversation he had with Sir EDWARD FRY concerning appeals of decisions rendered by the Court of 1899. Sir EDWARD FRY and himself think that such appeals might undo the authority of the court and, so far as he himself is concerned, he has renounced this right of appeal.

We do not desire to diminish the authority of the old court; let us find a phraseology which will clearly state that revision will in no way affect its authority, and that there shall be no obligatory appeal from one court to another.

His Excellency Mr. **Mérey von Kapos-Mére** fully agrees with the remarks offered by the PRESIDENT: We must not establish the shadow of a presumption of preference in favor of the court which is to be established.

But Article 16 states: Competent *unless* one of the two parties objects thereto.

It might perhaps be better to state: "*If the two parties agree.*"

Without this correction, there is a real preference.

Mr. **Kriege** does not offer any objections.

The **President** consults the committee with regard to the demanded suppression of paragraph 1 of Article 16. It is adopted by a raising of hands of ten against three. Paragraph 2 is unanimously retained.

With regard to the third paragraph of that same article, Mr. **Kriege**, his Excellency Mr. **Martens**, Mr. **Guido Fusinato**, his Excellency Sir **Edward Fry**, Mr. **James Brown Scott** and Mr. **Louis Renault** exchange their views as to whether the matter concerns a revision or an appeal.

[631] His Excellency Mr. **Martens** once more insists upon the imperative

necessity of suppressing the stipulation concerning the revision of arbitral decisions, that is to say, of paragraph 3.

Paragraph 3 of Article 16 is finally suppressed but with the understanding that "the special agreement" referred to under paragraph 2 may foresee the revision by the High Court.

His Excellency Sir **Edward Fry** once more asks that the word *"general"* be suppressed after the word *"treaty"* under paragraph 2.

His Excellency Mr. **Mérey von Kapos-Mére** desires to put this question: Is there any serious reason for not accepting the phraseology of Article 21 of the Convention of 1899, and for not substituting it in the place of Article 16 of the present project which expresses absolutely the same idea?

Mr. **Kriege** replies that he accepts likewise the phraseology of Article 21.

Mr. **Louis Renault** explains the difference existing between the expressions *"general treaty"* and *"special agreement."* It might be stated: *"By reason of a general arbitration clause."* This phraseology would be applicable both to permanent arbitration treaties and to *compromis* clauses.

The **President**: In short, three cases may present themselves: 1, general arbitration treaty; 2, arbitration clause in a treaty; 3, special agreement. His Excellency Sir Edward Fry, Messrs. Kriege and Louis Renault will be kind enough to bring before the committee the best phraseology upon which they may agree.

Mr. **Louis Renault** proposes the following expression:

> By reason of a general arbitration provision or of an arbitration agreement.

It is accepted.

The committee takes up the matter of the distribution of the judges.

The **President** summarizing the discussion which has taken place upon this matter and the general opinion of the committee, indicates that all the propositions concerning the permanent court, especially those from the delegations of Brazil and of China must be printed as annexes and distributed to all the members of the first subcommission. As regards the text of the Anglo-Germano-American proposition, that text shall be published by its authors and distributed as a second corrected edition, to all the members of the first subcommission in order to keep them informed of the course of our labors.

The meeting closes.

[632]

FOURTH MEETING

AUGUST 24, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10 o'clock.

The minutes of the second meeting are adopted.

The **President** reads aloud the following note, addressed to the committee by his Excellency SAMAD KHAN MOMTAS-ES-SALTANEH.

The Persian delegation has sincerely concurred in any proposition tending to develop the principle of arbitration.

Obligatory arbitration has appeared to us as an ideal of peace and justice to be realized.

The project of the creation of a permanent court upon the most solid bases had inspired us with no less confidence, and we had hoped that in this way a great step forward in the field of law would be accomplished.

Unfortunately, the various propositions that have been submitted to us have not sufficiently taken into account the principle of the juridical equality of the States.

This principle should have had its application in the system of the composition of the Permanent Court.

The other interested delegations will explain their apprehensions and state how much they fear that the public opinion of their country and the judgment of history will be against them.

As for ourselves, be it permitted us to state that apart from the question of principle to which we have just referred, we have learned with deep regret that in the recruiting of the members of the court, Persia has been relegated to fourth rank.

A country which records an existence extending over thousands of years, and which, as has been proven by the discoveries made in Suziane, was one of the great centers of civilization, a country with 20,000,000 inhabitants, with arts and a literature universally known, was entitled to higher regard, to a place worthier of its past, and, I am able to say, more conformable to its present position.

I do not mean to refer to that Persia of several thousands of years ago, as attested to by the continual discoveries of the French Scientific Mission,
[633] but of the Persia of to-day, of the Persia which has just given such an illustrious example of the wisdom of her people. An evolution has in fact taken place in our country, the evidence of which may be felt even now without any of those deplorable upheavals or even those agitations and excesses which in many States have transformed any popular movement into a revolution. The Persian nation, so calm and worthy in its claims, has shown that it is a friend of progress and that it likewise desires to enter into the ways of western civilization.

Because of her glorious past, because of her present efforts, Persia would, therefore, deserve the kindly encouragement of this high assembly and a more honorable place in the composition of the Permanent Court.

We are not here to further the triumph of the right of might, but to affirm the force, the power of right. If in this attitude we should be mistaken, we would find ourselves compelled to vote against the project of the Permanent Court which we are now discussing, after having sincerely championed the principle of it.

It is decided that all documents relative to committee B, as well as those relative to committee A, are to be distributed to all the delegates.

The program of the day calls for the continuation of the discussion of the project concerning the Permanent Court. As text for this discussion, the committee takes the second edition of the draft convention prepared by the three delegations of the United States, Germany, and Great Britain, and distributed on August 24.[1]

PART II.—Competency and Procedure

Article 19

The International Court of Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

His Excellency Mr. **Asser** would like to know in connection with this article if the latter will apply to all the States without distinction or only to the signatory or adhering States. He believes that from the practical point of view it is preferable to reserve access of the court to the latter.

Mr. **Kriege** does not desire to pronounce himself upon this question before knowing whether or not all the Powers adhere to the Convention.

Article 19 is adopted under the reservation of the special provision which shall be submitted, if necessary, by the authors of the project.

The **President** brings to discussion Article 20.

Article 20

The special committee (Article 8) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed in seeking a summary procedure;

2. To discharge the duties assigned to commissions of inquiry by the Convention of July 29, 1899, so far as the Court is entrusted with such inquiry by the parties in dispute acting in common agreement.

[634] His Excellency Mr. **Martens** reiterates the fears he has already expressed with regard to the denomination *"special committee."* All his sympathies go to the idea of a tribunal even reduced to the number of three judges; this is well known since the Russian project was the first to advocate this very institution. But in reality this "committee" will be the real tribunal and it will devolve upon it, not merely to settle the questions that may be submitted to it, but even, in virtue of Article 16, to decide if it is proper to convoke the court.

It seems, therefore, that in all respects the name *"Permanent Tribunal of Arbitration"* is more conformable to the duties of this judicial body than that

[1] Annex 84.

of "*committee,*" and he proposes, therefore, that the idea of his project and its terminology as well be accepted.

Mr. **Kriege** believes that the expression "*special commission,*" already adopted for the regulation of the prize court might be used.

The **President** proposes to settle in the first place the matter of competence. We shall then find the proper name; once the function of this body shall have been well understood, the organ itself will find its natural definition. The competence seems even now to be connected with the idea of a summary procedure. For the necessary condition for the competence of the committee is that the parties shall have demanded a summary procedure; therefore, it is not the nature of the case, but the form of the procedure implied which shall determine whether or not the committee is competent. We are to find out if this summary procedure is to be applied only before the old permanent court or also before the new court of justice.

Mr. **Louis Renault** replies by saying that the French proposition with regard to summary arbitration intended to create a very particular procedure which might be sufficient by itself. It is not exclusively connected with the Convention of 1899.

The **President** would wish to avoid the increase of parallel judicial machinery. Let us simplify matters as much as possible. We want to know if we desire two summary procedures or only one.

Mr. **Kriege** states that in the French proposition regarding summary arbitration, distinction must be made between the matter of the composition of the court and that of procedure. As regards the former, the freedom of the parties is complete, and Article 20 of the present project is in no way contrary to this principle. As regards procedure, the committee will have to apply the rules contained in the French proposition, if they are adopted and included in the Convention. This results from Article 23 of that project.

Mr. **Louis Renault** suggests that the reference regarding summary procedure be inserted in Article 20.

His Excellency Mr. **Martens** has heard with pleasure the explanations furnished by Mr. KRIEGE. Up to the present, he himself and others of his colleagues have been wondering why the French proposition regarding summary arbitration has never referred to the Hague Court, which is likewise in need of a regulation of summary procedure. He has tried to interpret this omission as something that might regrettably have been overlooked; therefore, he shall make note of the fact that the rules of summary procedure contained in the French proposition shall likewise be applied by the Hague Court. This is an important matter which must be emphasized.

The **President** replies by stating that in his judgment there was never any doubt as to this matter; he concludes by declaring that if the French project is finally adopted, as is to be hoped, Article 20 shall contain a reference to Article 23.

[635] Mr. **James Brown Scott** states that it is the French project which suggested the idea for the articles of Part II of the proposition of the three delegations.

Point 1 of Article 20 is adopted.

The committee then passes on to the discussion of point 2 of Article 20.

Mr. **Heinrich Lammasch** recalls that in 1899 great care had always been

exercised to distinguish between the commissions of inquiry and the arbitral court. The separation of the duties is a natural guarantee for the good operation of the two organisms. Mr. HEINRICH LAMMASCH believes that the members of the international court who, as a special committee, might be called upon to perform the rôle attributed to the commissions of inquiry would be scarcely satisfied with the mere establishment of the facts. Therefore, he proposes to omit point 2 of Article 20 of the project.

His Excellency Sir **Edward Fry** defends the phraseology of the article; according to him there is no conflict between the duties and the powers of the judges.

Mr. **Kriege** states that according to the new provisions with regard to commissions of inquiry which have been here adopted, the parties have full freedom in the constitution of the Commission. Therefore, he sees no reason for forbidding them to have recourse to the special committee.

Mr. **Louis Renault** does not either see any serious reason for this restriction of the freedom of the parties who might frequently desire to profit by the services of an institution ready to act. The only doubt he entertains is whether it will be necessary to establish that there is no incompatibility between the functions of the members of the commission of inquiry and those of the arbitration court.

His Excellency Mr. **Asser** states that the latter consideration appears to him to be specious. Recent codes tend to appoint to the court the judge who has conducted the inquiry. His Excellency Mr. ASSER sees still another objection. Upon whom would devolve the special expenses occasioned by the functioning of the committee as commission of inquiry? Are they to be included in the general expenses of the court mentioned under Article 28 and to be borne by all the signatory Powers?

The **President** is of opinion that for the moment the matter of expenses should not be discussed.

His Excellency Mr. **Martens** states that he has not been convinced by the arguments of Mr. HEINRICH LAMMASCH; there is reason for retaining paragraph 2; we must leave to the parties freedom to go to a jurisdiction which already exists if they find it convenient to do so, rather than go before another jurisdiction. On the other hand, he shares the scruples expressed by Mr. LOUIS RENAULT with regard to incompatibility.

Mr. **James Brown Scott** declares that this last matter is clearly settled in Article 9 of the project.

Neither does Mr. **Heinrich Lammasch** desire to establish an incompatibility between the functions of a judge of the court and a member of the commission of inquiry; but Article 20 of the project gives to the parties the right to appeal not to the persons, but to the body; he admits quite readily that A, B or C as judges, might be chosen as commissioners, individually, but not collectively;
[636] he believes that it will be difficult for this judicial body to act collectively as the commission of inquiry. It will reluctantly depart from its character as a tribunal.

The **President** realizes that Article 10 of the project concerning the commissions of inquiry, which was worked out right here, provides for the complete freedom of the parties as regards the constitution of the commissions. It seems, therefore, difficult to prevent the parties from addressing themselves to the special

committee. Reference to Article 10 might be made in the text of Article 20. It is perfectly evident that the spirit of the commission of inquiry and that of the court must not be confused; but, at all events, if it is desired to limit the functions of the judges, it should be so stated. The commissions of inquiry are constituted without conditions.

His Excellency Mr. **Mérey von Kapos-Mére** states that Article 10 does not, in his opinion, seem to give to the parties the freedom of choosing a judicial body such as, for instance, a court of appeals.

Mr. **James Brown Scott** asks if Article 22 of the project does not in a measure give satisfaction to the misgivings of Mr. Heinrich Lammasch.

His Excellency Sir **Edward Fry** believes that Article 20 in its present construction sets a well-defined limit between the rôle of the special committee acting as a tribunal and that which it might perform as a commission of inquiry.

The suppression of point 2 of Article 20 is put to a vote and rejected by the committee of examination.

His Excellency Mr. **Eyschen** asks if the special committee is *obliged* to accept the mandate of acting as a commission of inquiry.

Mr. **Guido Fusinato** enlarges upon this question. We must be more specific; we must clearly state that the judges are obliged to exercise the judicial functions or those of commissions of inquiry and that they may not escape such duty.

Mr. **Louis Renault** also dwells upon this same question, by saying it is a normal duty.

Mr. **Kriege** is of opinion that the duty of the judges to exercise their functions is so evident that it seems to him useless to stipulate it.

His Excellency Mr. **Martens** considers the question raised by Mr. Eyschen of very grave importance. It seems to imply the right of the judges to refuse to perform their judicial duties. He recalls the fact that the Powers quite frequently, for one reason or another, have met refusals from members of the Permanent Court whom they had approached. No one is compelled to accept appointment to the court, but from the moment that the position is accepted the obligation must be discharged; its duties may not be evaded by anyone. His Excellency Mr. Martens further points out the necessity of making, by positive stipulation, the members of the court independent of their Governments. Without such precaution a State could easily, on political grounds, reprove a judge over whom it has jurisdiction for accepting the office of judge in such or such a case.

Mr. **Eyre Crowe** believes, even as Mr. Kriege, that the obligation for the judge to exercise his mandate is so normal and so manifest that it is unnecessary to refer to it in a special stipulation. The judges of the new international court of justice will be functionaries; this will show the difference between them and the members of the old permanent court.

His Excellency Mr. **Martens** likewise draws this difference.

[637] The **President** in summarizing the discussions, states that it is clear that the judges of the new court will be functionaries of the international judicial organization. They must sit save in cases of legal prevention. The new text seems unnecessary. It will be sufficient if the report defines the nature of the functions and the obligations resulting therefrom; and if the minutes make

record of the remarks exchanged and of the agreement reached upon this matter in the committee. (*Approval.*)

Mr. **Heinrich Lammasch** thinks that the obligation should be at least expressly stipulated with regard to the case provided for under point 2 of Article 20. Therefore, he proposes to say that the members of the special committee may be called upon to act as commissioners of inquiry and that they must obey such summons.

Mr. **Louis Renault** finds this addition useless in view of the fact that the exercise of the functions of commissioner of inquiry forms a part of the duties of the judges.

The proposition of Mr. Heinrich Lammasch is put to a vote and defeated.

His Excellency Mr. **Asser** again returns to the matter of expenses occasioned by the functioning of the special committee as a commission of inquiry. So soon as it is called upon to fulfill this rôle in its quality as committee it would be just to allow to it a special indemnification.

His Excellency Mr. **Choate,** in comparing Articles 20 and 22 of the project, states that if among the members of the commission of inquiry there are persons taken from outside the list of the judges of the court, they must be specially remunerated; on the other hand, he is opposed to the granting of any special indemnification to the members of the court.

Mr. **Louis Renault** states that paragraph 2 of Article 11 settles that question in view of the fact that it allows a certain amount to the judges of the court during the session or during the exercise of functions conferred upon them by this Convention.

His Excellency Mr. **Asser** sets forth the greater burden of the duty incumbent upon commissioners of inquiry and refers to the expenses of displacement which may be considerable.

Mr. **Louis Renault** does not see how it is possible to make the expenses depend upon the length of the cases.

Mr. **Kriege** states that paragraph 2 of Article 11 refers to the functions of the commissioners of inquiry.

His Excellency Mr. **Martens** also dwells upon the importance of the very high expenses that might be occasioned by travel into distant countries which the commissioners may be required to undertake.

The **President** and Mr. **Kriege** both call attention to the fact that paragraph 2 of Article 11 refers also to traveling expenses and in a particularly general way. Lastly, paragraph 3 of the same Article 11 includes such allowances in the general expenses of the court.

His Excellency Mr. **Nelidow:** Such expenditures come within the item of expenditures of procedure. It seems as though it were sufficient to specify this intention both in the report and in the minutes.

Mr. **Louis Renault** observes that it will be necessary to modify Article 9 so as to leave to the parties the right to appoint as arbitrators the judges who have acted as investigators.

[638] Mr. **Kriege** asks that the matter of incompatibility, which seems to him to offer diverse aspects and which will require a supplementary study, be reserved.

It is so decided.

The **President** brings up for discussion paragraph 1 of Article 21.

ARTICLE 21, PARAGRAPH 1

The special committee is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

His Excellency Mr. **Asser** proposes to add to the words *"to settle the compromis,"* the words *"or to settle the special points of the compromis."*

His Excellency Mr. ASSER remembers a case in which he sat as arbitrator and in which a disagreement had arisen between the parties concerning a special point of the *compromis* after it had been signed.

After an exchange of views, the committee is unanimous in declaring that the competence of the tribunal called upon by Article 21, to draw up a *compromis,* is also competent to settle the special points that might give rise to difficulties.

Paragraph 2 is then taken up.

ARTICLE 21, PARAGRAPH 2

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic understanding in the case of:

1. A dispute arising from contract debts claimed as due to the *ressortissants* of one country by the Government of another country, and for the settlement of which an offer of arbitration has been accepted.

Proposition of the German delegation

2. A dispute covered by a general treaty of arbitration providing for a *compromis* in all disputes and containing no stipulation to the contrary. Recourse cannot, however, be had to the Court if the Government of the other country declares that in its opinion the dispute does not come within the category of questions to be submitted to compulsory arbitration.

His Excellency Count **Tornielli** asks that the words *"a diplomatic understanding"* should be replaced by *"an understanding through the diplomatic channel."*

His Excellency Mr. **Ruy Barbosa,** though he has until now intentionally abstained from taking part in the discussion, cannot withstand the desire to ask for some explanations. According to his conception, arbitration can never exist without a *compromis* between the two parties, and it seems to him that if usually the court has a general competence it never has a special competence except in virtue of a *compromis* signed by the parties.

But here Article 21 seems to confer upon the court the right to take cognizance of a litigation without the consent of the parties; this presents a great innovation and calls for explanations.

Mr. **James Brown Scott** desires to furnish some explanations regarding No. 1 of paragraph 2 of Article 21.

[639] The proposition of General PORTER lays down the principle that States must not use force in collecting contract debts, but must resort to arbitration. The enforcement of the principle depends on the *compromis,* and it is more often difficult to frame the *compromis* than to decide on arbitration. It therefore seemed advisable to entrust the formulation of the *compromis* to an impartial and neutral special committee which would thus assist both parties and prevent a regrettable resort to armed force.

An examination of the provisions of the Convention of 1899 dealing with this matter discloses an omission in Article 24. If the parties fail to agree upon the *compromis,* it is not concluded. This defect we propose to remedy.

His Excellency Mr. **Ruy Barbosa** declares that these explanations do not fully satisfy him.

Their Excellencies Sir **Edward Fry** and Baron **Marschall von Bieberstein** ask that discussion of No. 1 of paragraph 2 of Article 21 be reserved until after the vote upon the proposition of General PORTER.

This discussion is reserved.

The committee passes on to No. 2 of paragraph 2.

His Excellency Baron **Marschall von Bieberstein** justifies, in a few words, the German proposition contained in No. 2 of paragraph 2 of Article 21.

Our proposition is conceived along the same general lines as paragraph 1, but it possesses a much more general character. The case presented is that of the parties having concluded a treaty making arbitration obligatory—either in a general way or in specific cases—and providing for the signature of a *compromis*. I may take as an example the first two articles of the treaty between the Netherlands and Denmark.

Now the following difficulty may arise; the two parties, although agreeing in equal good faith to admit that the difference between them comes within the bounds of obligation, fail to reach an agreement as to the text of the *compromis*. The situation has become peculiar; two Powers have erected machinery with a mutual promise to put it into operation when divided by a contention. A contentious case arises and they cannot use the machinery because of their inability to agree. In such a case obligatory arbitration, which shines on paper, vanishes in fact. This condition of things would be contrary not only to the great idea of obligatory arbitration, but also to the great idea which impels us to exert our best efforts in the cause of the peaceful settlement of disputes among States. Arbitration would be obligatory as long as there is no dispute, but would become optional as soon as one arises. We favor obligatory arbitration, but desire it to produce practical results. We wish to perfect it so that it will become an available reality.

In accordance with this sentiment, I have the honor to offer the following proposition: if two parties agree to admit that a dispute comes within the bounds of the obligation, and if no agreement can be reached on the *compromis*, each of the parties shall have the right to demand that the *compromis* be made by the committee.

In a word we propose the *compulsory compromis* as the complement of the *compulsory arbitration*.

[640] Mr. **Guido Fusinato** fully concurs in the German proposition which he deems excellent and practical. It aims at the same object as that of the clause inserted by Italy in two of her obligatory arbitration treaties, and according to which, for lack of a *compromis*, the arbitrators are to judge on the basis of the mutual claims of the parties. This means that they are to establish the *compromis* themselves.

Nevertheless, Mr. GUIDO FUSINATO somewhat hesitates in accepting the second part. For it is stipulated in this part that the committee shall no longer have the competence which had been previously granted to it in case a Government should declare that the dispute did not come within the cases of the application of obligatory arbitration. But it may well occur that an arbitration treaty should forbid the invocation of such an exception; it is also possible that an arbitration treaty may stipulate that, if necessary, the arbitrators themselves

are to decide the matter. It seems that for these cases, there is no reason for the German proposition and that its second part should, therefore be suppressed or modified.

His Excellency Baron **Marschall von Bieberstein** agrees that such a restriction may not be necessary in certain treaties, but he declares that it is indispensable in a series of some treaties in which the reservation of honor and independence has been foreseen. In such cases it is impossible to give to one party the right to force a *compromis* upon the other State when the Government of the latter declares that it availed itself of the reservation; but there is no treaty, not even the treaty between the Netherlands and Denmark, which does not contain a reservation.

His Excellency Sir **Edward Fry** does not accept the German proposition. He believes that it is proper to preserve the rule of paragraph 1 and not to make obligatory in one case what is optional in another case.

He then observes that the German proposition could in no case change the régime of conventions already concluded—and could never be applied to them.

The second part of it is, moreover, of a very doubtful obligatory nature, since one of the parties may always declare that the principle of obligatory arbitration does not apply. His Excellency Sir EDWARD FRY believes that even this provision is of a nature to invite the Governments to the commission of a falsehood, by declaring that the controversial case does not come within the treaty, in order to avoid the *compromis* to which they are opposed.

His Excellency Baron **Marschall von Bieberstein** replies by stating that if the German proposition enables a State to avoid arbitration through a falsehood, its rejection will render the commission of a falsehood even easier, and more to be feared.

When the Governments shall be bound by a treaty, the one of them that may wish to elude its engagement, need merely refuse to conclude the *compromis*. The entire English list, for instance, would exist on paper only, whilst the German delegation desires that it be something more than a mere word.

His Excellency **Alberto d'Oliveira** vigorously supports the German proposition which, to his mind, would form the natural complement of an obligatory arbitration treaty.

It is possible, however, that a new phraseology may satisfy Sir EDWARD FRY; it may be stated "if the dispute does not come within the category" instead of "if the Government of the other country declares that in its opinion, etc."

This question does indeed have to be settled at times by the parties, but always by the treaties themselves, and it is thus that the convention which
[641] would approve of the Portuguese list which does not foresee any reservations, would not admit that one of the signatory Powers might constitute itself the judge of the obligation to have recourse to arbitration.

His Excellency Mr. **Martens** would like to present a few remarks with regard to the eloquent and very interesting discourse of Baron MARSCHALL. He wishes to state in the first place that the explanations just given by the first delegate from Germany constitute within the limits of his proposition, a fine tribute to obligatory arbitration.

His Excellency Mr. MARTENS desires to call attention to the fact that he finds an actual contradiction between the two parts of the German proposition; the first which establishes the obligation of concluding a *compromis,* and the second which

grants to each State the right not to submit to arbitration. With the second paragraph all obligation disappears; it lies within the discretion of the engaged State. On the basis of these engagements, he insists vigorously that the second paragraph of Article 21 be absolutely suppressed.

Mr. **Guido Fusinato** desires to state that his remarks had no other object than that of further enhancing the value of the German proposition in which he fully concurs. Along this same line of thought he proposes, therefore, the following phraseology:

> Nevertheless, recourse to the Court does not take place, if, conformable to the arbitration treaty, the Government of the other country declares that the dispute does not come within . . . etc.

Mr. **Kriege** thinks that the question as to whether the dispute comes within the category of those disputes which must be submitted to obligatory arbitration is not of the kind that can be settled by the special commission. This question presents itself under a twofold aspect. At one time it is desired to know if, by its nature, the dispute comes within the field of the treaty; at another time it is desired to know if it is proper to invoke the reservation of honor, of independence, etc. These matters are frequently of great political importance; they could, therefore, not be decided, without inconvenience, by a commission of three jurists; they lend themselves better to settlement through diplomatic channels.

His Excellency Mr. **Mérey von Kapos-Mére** thinks that there is a slight misunderstanding. There is apparently a confusion of two different questions: 1, that of finding out if this or that dispute comes within the scope of an arbitration treaty; with this we need not for the present concern ourselves; 2, the question viewed by the German proposition which foresees the case when the parties, *already agreed* as to the obligation to submit the dispute to arbitration, are not agreed as to the establishment of the *compromis*.

Let us confine ourselves to a consideration of this second matter. To present it clearly, I would propose a new phraseology of paragraph 2:

> 2. Of a dispute which has arisen between two or several Powers, and admitted as coming within a general arbitration treaty which foresees for each dispute a *compromis* and does not exclude the eventual competence of the special commission for the establishment of such *compromis,* either expressly or by concrete stipulations.

His Excellency Mr. **Asser** supports the German proposition.

He would undoubtedly prefer that the second part should not enable the Governments to avoid arbitration; but he believes that in the present state of disposition of the countries represented in this Conference we must, for the present, be satisfied with a *lex imperfecta.* But he has not the slightest doubt that the day will come when a real High Court of Justice will be established which will permit of bringing about the *lex perfecta.*

[642] His Excellency Mr. **Choate** declares that the delegation from the United States of America cannot accept the German proposition.

It deals, in fact, only with desperate cases with regard to which diplomatic negotiations have failed, and only with the hypothesis of a general arbitration treaty.

Never has anything like it been entered into the thirty treaties hitherto

concluded—never has it been proposed to impose a *compromis* not consented to by the two parties.

Gentlemen, you all are aware of the difficulties which the approval of the treaties signed by the American Government has met with in the Senate. The delegation from the United States believes that it is morally impossible for it to sign at present a convention foreseeing the eventual signature of the *compromis*, without knowledge either of its tenor, or of its scope.

His Excellency Mr. **Nelidow** remarks that the delegation from the United States of America in No. 2 of paragraph 2 of Article 21 *a* does nevertheless accept No. 1 of this same article which refers to an analogous case.

His Excellency Mr. **Alberto d'Oliveira,** in order to do away with any misunderstanding, desires to affirm that he declared that it is the treaty and not the court which should decide whether or not the matter concerned a case for which arbitration is obligatory.

His Excellency Baron **Marschall von Bieberstein** will refrain from replying to Mr. CHOATE for the reason that, since his objection rests only upon the special nature of the public institutions of the United States, his delegation alone is judge of that matter.

But as to Mr. MÉREY, he has perfectly expressed the view-point of the German delegation and the reasons which decided its members to present the proposition which is solely directed to indicating in what manner the *compromis* must be drawn up when the parties do not agree. Baron MARSCHALL approves of the phraseology presented by the first delegate from Austria-Hungary.

His Excellency Mr. **Eyre Crowe** sets forth the difficulties of the question that has been raised. He believes that to solve the question of knowing in what form a certain case was to be submitted to arbitration will frequently settle the dispute itself. In this connection, he refers to the *Alabama* case: when an agreement had been reached with regard to the questions to be submitted to arbitration, the dispute was settled.

His Excellency Mr. **Mérey von Kapos-Mére:** Has Mr. CHOATE accepted the first point of Article 21?

His Excellency Mr. **Choate:** Certainly.

The meeting closes at 12:20 o'clock.

[643]

FIFTH MEETING

AUGUST 27, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4: 15 o'clock.

The minutes of the third meeting are adopted.

His Excellency Mr. **Ruy Barbosa** delivers the following address:

Mr. PRESIDENT: The First Peace Conference whose work, according to our belief, will be regarded as greater than ours, fortunately took care not to compromise it by indulging in revolutionary audacities. With great wisdom it understood that only such reforms are durable whose evolutionary character respects the organic principles in the great results of time and necessity. Called upon to establish concord, it did not desire to sow the germs of conflict by laying hands upon that network of essential laws which keep the nations from lapsing into barbarism, by maintaining them equal within the field of law.

We are departing from the proper course in still another sense. Under the preoccupation of removing war, we are tending to shake the most solid basis of peace by attacking that equality of right which was the last brake to the ambition and to the pride of the peoples. We would inject into their relations the basis of a justice whose nature would be characterized by a juridical distinction of values between the States, according to their greatness and their power. The Powers would then no longer be formidable only by the weight of their armies and their fleets. They would also have a superiority of right in the international magistracy, by arrogating unto themselves a privileged position in the institutions to which we pretend to entrust the meting out of justice to the nations.

In the organization of international arbitration the First Peace Conference declared that, no matter what might be their power or their greatness, all the nations are equal. The Second Conference, on the contrary, would fix the standard of the differences between the peoples in the very heart of the tribunal whose function it should be to reestablish the balance of justice between the weak and the strong. No longer would every State have a place in that court. No. The seats in that court would be distributed among the nations according to their influence and their power.

[644] For the organization of the arbitration court the same system of apportionment as for that of the prize court has been adopted. And yet it is difficult to conceive of two things differing more from each other. Still, as if they were analogous institutions, it is sought to organize them on the basis of similar standards. Different rates of value are sought by which to represent the different States and they will be adapted thereto on the basis of this gradation.

What is the key to this situation? It cannot be found. Take any consideration whatsoever and on the basis of it verify such an apportionment: you will easily find that the project contains nothing but injustices. I did this with reference to the prize court. I always got for an answer that the plan was pliant and obeyed diverse considerations. But what are these considerations? Care was always taken not to tell me.

With regard to the arbitration court we will likewise be told that the table of precedencies had its source in other considerations. Such considerations, provided they do not concern either the population, the navy, the wealth that can be calculated on the basis of commerce, industry and public revenue, are of an unprecise nature whose vagueness lies beyond the power of analysis; and under the protection of this intangible standard their examination is made impossible.

Moreover, it is not to be regretted that such an examination may have been forbidden us; for in an assembly of States it is repugnant to propriety to submit to a reciprocal comparison of values other than those which have a purely material expression such as population and wealth. But it is this very thing which, in a mute but sorry fashion, is imposed upon us by this table of classes between sovereign States which in affixing their signatures thereto would have to declare themselves nations of a third, of a fourth or of a fifth rank.

If Europe and the United States itself were better acquainted with our continent, no attempt would be made to inflict this grave injustice upon nations with a future before them and already remarkable because of the progress they have achieved. They are not tributary States such as are met with in other parts of the world; they are not peoples that have come to the end of their development as some of the Old World ranked above us in this hierarchy: they are nations in the full exuberance of youth that have inherited something from every European civilization and not so far removed, as may be supposed, from the intellectual center of this continent, and that, now in the full bloom of a marvelously robust life, have already passed beyond many of those placed above us in that unhappy classification, and that will soon have outstripped many others.

Fortunately this question is not to be brought up on this ground, for we differ from the project precisely with regard to its principle. The project invites us to discuss ranks, to justify places. We do not accept the ranks. We do not dispute places. Brazil as a sovereign State and in that respect the equal of any other sovereign State, no matter what its importance be, aspires only to a place, in the arbitration court, equal to that of the greatest or of the humblest State in the world. We believe in the sincerity of the noble words of Mr. Root in his memorable address of July 31, 1906, before the Pan American Congress at Rio de Janeiro. In that address he stated:

> We deem the independence and equal rights of the smallest and weakest member of the family of nations as entitled to as much respect as those of the greatest empire.

These words reverberated everywhere in our continent as the American gospel of peace and of right. This is the first opportunity to put their sincerity to the test. We fully trust them, in homage both to the truly exceptional
[645] mind of the statesman who pronounced them, and to the honesty, to the liberal genius and to the beneficent influence of the great nation which he governs and which, as Americans, we proudly love.

His juridical discernment will not uphold the argument which has already been made in defense of the project, to the effect that the equality of sovereign States is not violated provided that to all is given the right to appoint a judge, since all rights may be subject to conditions of exercise. It is not to a simple condition of exercise that one submits a right which is common to several subjects, when to some a continuous duration of this exercise is attributed, whilst it is, with regard to others, limited to a periodic existence. Can it be said that equal rights are granted to the different countries in the Permanent Court when to some of them judicial function is granted for twelve years, whilst to others such function is granted for only a single year? There are eighteen States grouped in this class with but one year of such exercise. Will anybody seriously maintain that they may believe themselves upon a footing of equality with those other eight whose exercise of the judicial function extends over the entire period of twelve years? It would seem a mockery if this had not been stated in this assembly. But, if the equality of right is not disowned in this difference between one year and twelve years, neither would it be in the difference between twelve years and twelve days. And if it were reduced to even a single day of exercising this judicial function, this sorry right would not be affected in its nature and, if a single week of judicial function in this court were conceded to Colombia or Uruguay, their right would be satisfied. They might flatter themselves with being, juridically speaking, on the same level with Germany, Great Britain or the United States each of which would exercise this judicial function during twelve years.

But when discussing so important a matter as the one which challenges our attention, our frame of mind must be serious. It is quite possible that we have not yet become fully aware of the importance of this matter. Hitherto, the States, however diverse because of their extent of territory, their wealth, their power, had, nevertheless, among themselves one point of moral commensuration. This was their national sovereignty. Upon this point their juridical equality could be established unshakably. In this fortress of an equal right for all, and equally inviolable, inalienable, incontrovertible, each State, large or small, felt that it was so truly its own master and even as safe with regard to the rest, as the free citizen feels safe within the walls of his own house. Sovereignty is the great fortress of a country. It constitutes the basis of the entire system of its juridical defense within the field of international law. But what is it we would do? We would meet, great and small, around a table, each taking part in a concert of a touching international friendship in order to subscribe to a convention which would establish a tariff of the practical value of sovereignties, by distributing among them portions of authority in proportion to the more or less unjust estimation of the weak in the balance of justice of the powerful.

Gentlemen, bear thoroughly in mind the consequences of this unequal treatment given to sovereign States in a matter which evidently treats of sovereignty. Please represent to yourselves the consequences of this precedent to the future applications, of which it would be susceptible for other effects. Would it always prove to the advantage of even those who now hold predominance? Would the fact that we have been convoked for the purpose of organizing this institution really prove in the interest of international peace? Truly, this practical age very readily neglects those principles of a moral order to which were in past times entrusted the guarantees of the defense of right against might. We must take

care not to multiply the instruments of might, when we imagine we are protecting ourselves against them, by taking shelter under the ægis of pacificatory institutions. Peace in servitude would be degrading.

And even though we were not, in national sovereignties, to meet with this impassable barrier against the adoption of the project, could the [646] inequality of the apportionment proposed in it be justified on any other basis whatever? It is said that from the point of view of the function of an international arbitration court, the interests involved vary among the different States according to their material importance in the scale of wealth and of power.

But even supposing that such a difference really existed, the situation in that case, it seems to me, would call for new guarantees to be afforded the weak against the strong, rather than for the increase of the privileges of the strong against the weak. Very rarely do the small dare to encroach upon the rights of the great. On the contrary, it is quite natural that the pride of the great should tend to disregard the right of the small. Among the powerful nations themselves disputes are not frequent. But disputes are frequent between the strong and the weak. Is it not a fact that in such a case the latter would be exposed far more to injustices than their adversaries, at least if to all an equal position were not assigned in the tribunal which is to sit in judgment over all? And, furthermore, the insignificant disputes of the small are at times of vital importance to them, whilst the important cases of the great may be mere accidents for the increase of their wealth.

All the difficulties with which this project is beset come from our losing sight of this fundamental fact: the equality between sovereign States. To this condition we have been brought as the result of an arbitrary conception: the need of establishing a new international arbitration court alongside of the existing one, instead of subjecting the latter to a reform which should correct its defects and fill out its gaps. Why establish another court? Why have two arbitral courts? This is beyond comprehension. If in the one which we are now considering, perfection is sought because perfection is wanting in the existing court, what reason is there to burden perfection and imperfection at the same time with the mission of justice between the States? What is it we should do? We should abolish the imperfect court and create in a perfect one the international organ of arbitration. With two permanent organs, arbitration will unfold two official systems of jurisprudence. The usefulness of this dual system is an undecipherable mystery to anyone who tries to ascertain the reasons.

When the duplicate of the court is arbitrarily admitted, the number of the members to compose the court is thereby arbitrarily fixed. We have taken a fancy to the number seventeen. Why have we not taken a fancy to the number fifteen or to the number nineteen? Nobody can tell. All that was known was that the number of nations is three times greater than the number seventeen. It then became necessary to satisfy the forty-six nations with the seventeen judicial seats. But this would be impossible if full justice were to be accorded to all. Nevertheless, it was done.

But in taking this course, it seems to us that the very opposite of what should have been done was done. When we are engaged in solving a problem, we never think of overlooking the inherent and fatal features connected with

the difficulties which must be overcome; and if we are unable to handle satisfactorily contingent and adaptable parts in the other elements of the question, then we give up the task, and we reach the conclusion that the case cannot be solved. But in the case we are considering, the very contrary was done. There was an unalterable term in the problem: the juridical equality of sovereign States. And it is this term which we are attempting to bend to our needs. There was another consideration, important, to be sure, but not of a natural, not of a vital or immutable nature; it concerned the number of judges to be determined for the constitution of the court; and it is said that this number cannot be changed.

And so, we reason in this manner: The court can have but seventeen members; the sovereignty of the States must accommodate itself to that number. I believe that we should have reasoned in quite the reverse order. If the institution in project could not be established without sacrificing the equality of the States, it would but follow that such an institution cannot be realized.

[647] But it seems to us that in this matter the difficulties of which we complain result less from the subject in itself than from the line of reasoning adopted by those who have taken it upon themselves to impart form to the thought of this organization. If we should adopt another line of reasoning, it is possible that all these difficulties might vanish.

To solve a dispute by means of a judicial decision, there are two possible authorities: the courts or arbitration. But we must not confuse these two, neither in their nature, nor in their consequences. But when disputes arise between nations, the only available means for their settlement is through arbitration. The jurisdictional authority disappears. For jurisdiction presupposes a dependence of subjection, of obedience, such as that of the subjects of the same nationality with regard to the sovereignty governing them, and between States one can conceive only of the bond resulting from a free will which freely engages itself, that is to say, the contractual bond of obligations which they agree to impose upon themselves mutually. To this idea we owe the origin of international arbitration.

Nevertheless, we have departed from it without being aware of it, but in a very perceptible manner, under the praiseworthy preoccupation of imparting to the arbitral function that consistency and permanency which the present court lacks. We are tending to replace arbitral justice with jurisdictional justice. And thence originate the difficulties. For if we are to establish a strict court of justice, it would be necessary to adjust it to the forms of the judicial institutions.

These latter, in their composition, are composed of a certain number of judges which must not be large. It would follow also that all their members should reside at the seat of the institution. Thirdly, according to this nature of the composition of the court, it is believed that it should always act as an indivisible collectivity so that the decisions should always, and of necessity, be pronounced by the majority of the members in plenary meetings. It is in this way that the inflexible number seventeen has been reached for the members of the court, in view of all the difficulties of an impossible apportionment among the forty-six independent States.

But if, on the contrary, we start with the correct idea, the idea of an arbitral court, in the exact acceptation of that word, then all this perplexity

disappears. In the first place, the authority for the arbitral court results from the choice of the judges. Therefore the latter might, of their own desire (and they would do this most frequently), designate from the court a small number of judges, say, one, three, five or seven, in order to settle the dispute. In consequence such a court would be expected to deliberate in plenary session only in those probably rare cases when the parties themselves would so demand, or when questions brought up in the judgment of cases submitted to these sections of the court would have to be settled.

This being accepted, it would not be absolutely necessary that the members of the court should reside at The Hague. It would be enough if the fixed *quorum* should always be able to get together easily shortly after convocation. And this would not be a difficult matter, in view of the fact that Europe of itself would furnish almost one-half of the total number of the members of the court.

But, while admitting that it would not be necessary to require all the members of the court to reside at The Hague, it would not be inconvenient at all if the court should include sufficient seats so that to each nation would be granted the right of having in it its permanent representation. It would be left optional with each State to exercise this right, either by appointing a member of its own, or by designating, in order to represent it, the representative of another State, or again by coming to an understanding with other Powers for the collective appointment of a common representative.

[648] We meet with this same plan in the present Convention concerning the pacific settlement of international disputes, a Convention of which, in our judgment, not only these salutary rules should be maintained, but especially the principle itself of equal right, for each State, to a representation in the court.

Furthermore, this principle would not be less irrefutable, if instead of organizing a real arbitral institution we were to impart to the new court the character to which reference is made in the project of the three Powers, rather of a court of justice than of an arbitral court. The creation therein outlined is that of a judicial court, the most powerful and most august that has ever been conceived. But the judicial function has ever been regarded as a delegation of sovereignty. This notion is a rudimentary one in public law. All known constitutions divide national sovereignty into three or four branches, one of which is the judicial power.

But if this is true with regard to the domestic law of the States, it will *à fortiori* be true also with regard to their external public law, whenever they decide to establish an international justice. This justice cannot be conceived of except as an international emanation from the sovereignty of the States.

But each sovereignty exists by itself, entire, independent and indivisible in its real unity. There can be no fractions of sovereignty, no fractional sovereignties. Sovereignties would not be fusible or amalgamable, without leading to a new sovereignty which takes their place. Therefore, if in the formation of the international court the States must appear as sovereign entities, it is absolutely necessary that each one of them should count for one complete unity and equal to the rest.

In the Hague Convention concluded in 1899, Article 23 ensures to each signatory Power the right of appointing representatives to the court. Each contracting party might appoint as many as four. In the projected convention the

number of signatory States would be but twice the number of those that have subscribed to the first. Why should we not now give at least one to each nation? The sum total would be but one-half reached in the present court, if each Power had appointed its four representatives.

Even this number is too large for a court, but, in the first place, if that number could not be reduced, the only just conclusion would be that the unknown quantity in the problem cannot be found, that the problem itself is practically unsolvable. We are here dealing with but one certain thing: the existence of the sovereignties, with the corollary of the equivalence of the States. If it is not possible to devise for the Permanent Court a form which does not come in conflict with this principle, then it is impossible to establish the permanent court.

Nevertheless, we do not believe that the means cannot be found to overcome this preliminary difficulty. Our proposition endeavors, in our judgment, to solve it with success.

If we but reflect that one member of the court may represent several States; if we furthermore realize that this representation imposes pecuniary burdens to which certain States may think it useful to submit without some future appreciable advantage, it will be seen that the total number of judges appointed would probably be inferior to the number of nations entitled to the right to sit in the court.

But whatever their number, it would only be by exception that the totality of the court would have to act. Ordinarily, disputes would be judged by a small number of the members of the court, chosen from its membership by the parties interested, and by mutual agreement. Nevertheless, and even for [649] those exceptional cases of a judgment being rendered in plenary court, the Brazilian proposition indicates the elements of a machinery which would conciliate the exigencies of judicial practice with that large composition of the arbitral body.

All its members would have the right to sit in the plenary sittings. But it is quite evident that, for the mere purpose of enjoying such a rare occasion, they would not decide to fix their domicile at The Hague, neither would they hurry thither from everywhere at the first convocation.

What, therefore, we would have to fear in practice, is less the excess than the insufficiency of the number of judges to deliberate in the plenary meetings. In consequence, it would be necessary to determine a minimum *quorum* for these meetings and guarantee its presence by efficacious means.

This has been provided for in our plan.

In the first place, it stipulates obligatory residence, but not at The Hague. In view of the fact that the plenary meetings are not frequent, it will suffice if the judges may reach there upon the first convocation. Thus, they are permitted to reside elsewhere, provided that distance does not prevent them from appearing immediately after they have been convoked. If for this purpose a period of twenty-four hours—which might even be increased—were allowed them, they would be able to take up their domicile in many other places of Europe.

But this condition of residence would extend to only a part of the members of the court. The court would be divided into three groups, each of which would be subject to this condition during only three of every nine years.

But for the deliberations the *quorum* would be even smaller; the duty of residence would be imposed upon only one-third of the members, merely to

ensure the presence of at least one-fourth of them. This one-fourth would constitute the indispensable number for plenary meetings. But, upon this basis, and supposing that the court were composed of forty members, but ten of them would be required for those meetings at which it would be called upon to decide cases.

No one who is not absolutely acquainted with the system of the organization of collective courts in those countries regarded as models to be followed in the matter of judicial institutions, can possibly find anything to object against this combination. In those countries, the courts of large membership are usually divided into chambers or sections in order to exercise the judicial function, even in matters of the highest importance.

Such, gentlemen, is the simplicity of the system we are proposing. As against the project under discussion, it has taken as its irrefutable basic idea that which the latter has made light of: the juridical equality of the States as sovereign unities in the society of nations. To avoid this basic idea, the plan which we are combating had to resort to things artificial and arbitrary by bringing in an invention which, because of its ingenious and subtle originality, may perhaps be regarded as admirable, but which, for that very reason, is not a product of truth, of life and of practice.

Although the means for setting our plan into operation may not be approved of, its fundamental principle cannot be avoided. We must hope that it may secure for it the vote of the great majority of the Convention. For if on the one hand we cannot believe that the weak nations will voluntarily repudiate the very principle of their existence, on the other, it seems to us that the great Powers themselves could not feel at their ease in a situation in which, in order to establish their ascendency, the very principles of right had been abolished.

It will thus be seen that we are not merely concerned about ourselves. By defending our right we are defending that of the rest; in the right of the rest of the nations we demand our own as well. If this project were to give to Brazil a place all to itself in the future court by dividing the Spanish
[650] Republics of South America into two or three groups it would be these Republics alone that could complain of this mutilation of their sovereignty. But we would like to fulfill our duty of American confraternity and of international solidarity, by supporting them in the defense of their rights as sovereign States. Ever since this project was presented, this has been not only the language of our Government in the instructions sent us by telegraph, but also the language used elsewhere, in the desire animating it to have it appear clearly and by all means at its disposal that this divergence of view, which we regret, is due only to our loyal friendship for the great American Republic.

If, in the beginning, because of a momentary idea of conciliation, we thought for the moment of the hypothesis of an intermediary solution which would have limited itself to decrease the inequalities of the project by improving it in a fashion useful not only to Brazil but also to the other Republics of Latin America, we gave up this idea at once, with no effort on our part to win support for it, so soon as we had recovered from the surprise of this innovation. While since that time we have rejected all idea of a possible compromise, yet we have shown no lack of initiative in proclaiming clearly and finally the principle to which we stand committed.

Our attention has frequently been called to the material inequalities between the different States whose cause we have associated with ours. We had not for-

gotten these differences. But they did not reach within the field of law. With the present population of 25,000,000 souls and a territory embracing nearly one-half of South America, Brazil might indeed protest the inequality of a division comparing it with other States, American or European, greatly inferior to Brazil in territory, in population and in wealth. And Brazil did protest. But this protest did not satisfy our conscience which was aroused by the evidence of a superior principle within whose domain there are neither great nor small States.

Mr. **Gonzalo A. Esteva** presents a declaration in these terms:

The Mexican delegation entertains the conviction that a new, really permanent arbitration court, such a one as we desire to create, must, in order to render the great services which is expected of it, and in order to win universal sympathy, esteem and confidence, be completely removed from every political or national, direct or indirect influence. It must be an essentially juridical organism, and, according to the fundamental rule of international law, that is to say, of the equality of the States, all the countries invited to the Second Peace Conference, whether they be great or small, powerful or weak, must be represented on the basis of the most absolute and of the most perfect equality! The Mexican delegation does not think that these essential conditions have been fulfilled in the present project of a convention relative to the establishment of an international high court of justice.

In accordance with the instructions from its Government, and in agreement with the personal feelings of its members, the Mexican delegation must not acquiesce in any convention in which all the States invited to the Peace Conference are not treated on the basis of the most absolute and most perfect equality.

For all these reasons which I have just stated, the Mexican delegation declares that it does not adhere to the project of a convention relative to the establishment of a high court of justice, presented by the delegations from Germany, from the United States of America and from Great Britain, and that it will cast its vote in the negative.

The **President** has special record entered of the declarations made by their Excellencies Messrs. Ruy Barbosa and Gonzalo Esteva. He declares [651] that these declarations do not constitute an obstacle to the continuation of the discussion of the project, in view of the fact that everyone is agreed with regard to the principle itself of the institution of a really permanent international court. (*Approval.*)

His Excellency Mr. **Ruy Barbosa** does not object to this view-point of the matter; it is understood that opportunity will be offered to present observations when the table of distribution shall be brought up for discussion.

The program of the day calls for the continuation of the discussion of Article 21 of the project of the three delegations.

The **President** reads aloud the amendment submitted by the Austro-Hungarian delegation concerning the German proposition and completing Article 21.

Mr. **Kriege** proposes to postpone to the second reading the discussion upon the amendment by the Austro-Hungarian delegation so as to enable him to submit a text in conformity with it.

His Excellency Sir **Edward Fry** does not see any difference between the German proposition and the Austro-Hungarian amendment.

His Excellency Baron **Marschall von Bieberstein** repeats that the German proposition contemplates the case in which a State should answer in the negative or not at all to the offer of concluding a *compromis* in execution of an obligatory arbitration treaty.

The propositions of Great Britain and the United States on obligatory arbitration foresee also this situation.

His Excellency Mr. **Mérey von Kapos-Mére** explains that in his amendment the words "concrete stipulations" refer to treaties that might confer upon the arbitrators themselves the right to settle the *compromis*.

Mr. **Guido Fusinato** refers, in connection with this matter, to the treaties concluded by Italy with the Argentine Republic (not ratified), with Peru and with Denmark.

Mr. **Eyre Crowe** states that the discussion refers to treaties not containing that stipulation.

The **President** distinguishes three cases:

1. Existing treaties which authorize the arbitrator himself to settle the *compromis;*

2. Existing treaties in which the parties have not conferred this right upon the arbitrator;

3. Treaties to be concluded.

In the first and third cases no difficulty arises. The matter has been or will be provided for by the signatory Powers.

As to the second case, the PRESIDENT believes that it would be difficult to regard the Conference as entitled to the right to act upon treaties already concluded and to impose upon the signatory States an authority which did not even exist at the time when those treaties were signed.

His Excellency Baron **Marschall von Bieberstein** declares that he entirely concurs in the view expressed by the PRESIDENT. He adds that, in his opinion, the Conference would also not have the right to insert the *compromis* clause into arbitration treaties already concluded.

[652] His Excellency Mr. **Choate** states that he sees only a difference in phraseology between the German proposition and the Austro-Hungarian project; both have in view the establishment of a *compromis* without an agreement between the two parties.

His Excellency Mr. CHOATE thinks that no State would wish to entrust this power to an authority which the State itself has not chosen. He explains the difference that he sees between numbers 1 and 2 of Article 21.

Number 1 contemplates special treaties that might be negotiated after the acceptance of the General PORTER proposition. The signatory Powers to these treaties would be confronted by the alternative of accepting arbitration and *compromis* or to feel the employment of force. In the second case, on the contrary, a general treaty of recourse to arbitration is contemplated.

His Excellency Mr. CHOATE observes that the sole consequence of the acceptance of No. 2 would be an insertion into treaties to be concluded of a clause providing that the States mean to exclude No. 2 from Article 21.

His Excellency Mr. **Asser** states that distinction must be drawn between arbitration treaties already concluded and those that may be concluded in the future.

The provision of No. 2 can be applied only to the latter, for it is impos-

sible, with regard to the others, to presume the consent of the parties and to cause them to accept a special committee long after the affixing of the signature to a treaty which is already concluded.

His Excellency Mr. ASSER proposes, therefore, to indicate in a few words in the Convention that only the treaties to be concluded are contemplated.

His Excellency Sir **Edward Fry** presents the following proposition:

> In the case of treaties now in force the *compromis* may be settled by the commission upon the request of one party with the assent of the other. In the case of treaties to be concluded in the future, the *compromis*, saving contrary stipulations, may be settled by the commission upon the request of one or of several of the parties.

The **President**, with the consent of the committee, reserves for the second reading the examination of the various phraseologies.

Article 22 of the project is then taken up.[1]

ARTICLE 22

The parties concerned may each nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the committee. If the committee acts as a commission of inquiry, this task may be entrusted to persons other than the judge of the Court.

Mr. **Heinrich Lammasch** points, in the first place, to a contradiction, more apparent than real, it is true, between this Article 22 and Article 8 of the project. In one case those coming within the jurisdiction of a party in dispute are excluded with a view to impartiality and in the other case, on the contrary, they are expressly granted the right to designate a judge to take part in the examination of their dispute. It seems that in the final phraseology of these two provisions, it would be necessary to take this small *in terminis* contradiction into account.

Mr. HEINRICH LAMMASCH then submits two further remarks concerning the vital part of the question.

According to the provisions of the project brought to discussion, the special committee is composed of persons elected by Powers not directly interested in the dispute. This has been stipulated with a view to impartiality; but we are now living under a régime of political alliances, and it is possible that more
[653] than one of the judges of the committee may be elected by the ally of one of the parties. Without questioning the integrity and the impartiality of the members of the court, Mr. LAMMASCH calls attention to a danger of partiality, always possible for judges chosen under such conditions, and he suggests to the committee to grant to the parties a certain right of recusation.

He believes that the institution which it is proposed to create might thus combine the advantages of the established judicial organism and those of arbitration, the fundamental principle of which is always the free selection of the judge.

The right of recusation would have this added consequence of removing all fear of the concentration of the powers of the committee in the hands of a very limited number of members.

Mr. HEINRICH LAMMASCH believes that it would also be well to increase the number of the members of the special committee.

[1] Annex 84.

Mr. **Eyre Crowe** replies by saying that the authors of the project have thought a great deal with regard to the propositions submitted by Mr. Heinrich Lammasch.

They are, nevertheless, of the opinion that it was best to institute a summary and rapid procedure for the solution of certain disputes of lesser importance, and it is for this reason that they have proposed a special committee composed of only three members who might sit quasi-permanently at The Hague.

Mr. Eyre Crowe believes, furthermore, that the increase of the number of judges would make the new organism less simple.

For the solution of all important questions, the parties will always have the right to have the court meet *in plenum*.

Finally, he fears that the right of recusation proposed by Mr. Heinrich Lammasch would have the regrettable effect of excluding the good, or at least the best judges.

Mr. **Kriege** does not concur in the view expressed by Mr. Eyre Crowe. He adds that the appointment of two judges by the parties, as foreseen in Article 22, is but a right which they may renounce. He believes that there will not be a few of such cases. This fact in itself alone seems sufficient to prove that the contradiction which some have thought exists between the two provisions is a contradiction in appearance only.

Mr. **Heinrich Lammasch** desires to reply in a few words to the remarks made by Mr. Crowe. He believes that the members of the special committee, no more than those of the court, will be obliged to sit permanently at The Hague. All that can, therefore, be required of them, is that they hold themselves ready to answer convocations more numerous than those addressed to the members of the court.

Mr. Heinrich Lammasch declares, however, that in his judgment it will be proper to create a machinery, simple and less heavy in its action than the *plenum* of the court, to judge cases of a certain importance such as might be submitted only to the special committee.

It is with this purpose in view that he proposes an increase in the membership of the special committee.

He feels convinced, lastly, that the right of recusation cannot have the ill effects feared by Mr. Crowe, and that although it might exclude the "best" judges, there would still be left a sufficient number of "good ones" among the members of the court.

His Excellency Mr. **Martens** also fears that the right of recusation will conflict with the very simple machinery of the present special committee.

His Excellency Mr. **Asser** takes up again the question which he put to the authors of the project in the course of the last meeting. Article 22 permits the parties to choose for the commissions of inquiry judges other than those of the special committee. Who will bear the supplementary expenses occasioned by them?

[654] Mr. **Kriege** says that it is advisable to distinguish two possible contingencies. If the parties call upon the judges of the court, the community shall bear the expenses; because it is the intention of the authors to place the whole court at the disposal of those who wish to resort to it. If, on the contrary, they look beyond the court and choose judges or experts, the parties themselves shall defray the expenses involved in their choice.

The committee adopts then without remarks Articles 23 to 28, suggested by the provisions already adopted for the prize court and reading as follows:

ARTICLE 23

The International Court of Justice follows the rules of procedure set forth in Part IV, Chapter 3 of the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 24

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

ARTICLE 25

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

ARTICLE 26

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

The special committee reaches its decisions by a majority of the members, including those added in virtue of Article 22.

ARTICLE 27

The judgment of the Court and the special committee must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 28

The general expenses of the International Court of Justice are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down [655] in Article 6.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

In answer to a remark by his Excellency Mr. MARTENS, Mr. **Kriege** announces that at the time of the second reading, he will present a text which will stipulate that the expenses of each party will be borne by each respectively and that such other expenses as might have been occasioned through procedure, shall be borne by them in equal parts.

Articles 29 and 30, and Part III, Articles 31 and 32 are then adopted.

ARTICLE 29

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

Within a year from the ratification of the present Convention it shall meet in order to elaborate these rules.

ARTICLE 30

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

PART III.—FINAL PROVISIONS

ARTICLE 31

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 32

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

Mr. **Heinrich Lammasch** calls attention to the fact that no doubt the project contains a gap. For in stating that the Convention will go into force only six months after the ratification, and in stipulating under Article 16 that the annual meeting will take place in the month of June of each year, the first convocation of this court will perhaps be postponed to the month of June, 1909. He believes that the authors will doubtlessly approve inserting in Article 32 a transitory provision which would permit of a convocation at an earlier time than the period stipulated.

[656] Mr. **Kriege** states that he will bear this in mind and that he will communicate a proposition to the committee at the time of the second reading.

The committee discusses the question as to whether or not it will be necessary to pass to the second reading. After an exchange of remarks in which take part especially their Excellencies Messrs. RUY BARBOSA and CHOATE, the whole of the project (reservation made of the table of distribution and of the remarks presented), is adopted at the first reading, and it is decided that the second reading of it will be taken up at the next meeting, set for Monday next, September 2.

The meeting closes at 6 o'clock.

SIXTH MEETING

SEPTEMBER 2, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 3 o'clock.

The minutes of the fourth and fifth meetings are adopted.

The **President** proposes proceeding with the second reading of the project of a convention relative to the establishment of an international court of justice.[1]

ARTICLE 1

With a view to promoting the cause of arbitration the signatory Powers agree to constitute, alongside of the Permanent Court of Arbitration, an International Court of Justice, of easy and gratuitous access, composed of judges representing the various juridical systems of the world, and capacle of ensuring continuity in arbitral jurisprudence.

His Excellency Mr. **Martens** would like to know what, according to the authors of the project, is the meaning of the word "gratuitous." In view of the fact that Article 32 stipulates that "each party pays its own costs and an equal share of the costs of the trial," his Excellency Mr. MARTENS believes that it might be possible to substitute a more exact word for "gratuitous."

Mr. **Eyre Crowe** explains that the word "gratuitous" must be taken in this sense, that the salaries of the judges who, in virtue of the Convention of 1899, are paid by the parties (Article 57) will not be borne by the latter according to the terms of the project, and that the expenses to meet the salaries will be borne by the signatory Powers.

His Excellency Mr. **Martens** proposes to adopt the expression *"easy and free"* instead of the words *"easy and gratuitous."*

This proposition is adopted.

[658] Mr. **Heinrich Lammasch** desires once more to call the attention of the committee to the name chosen for the new court. He reminds the members that the matter is of great importance and that this was likewise the opinion of the PRESIDENT at the time of the first reading of the project. An inexact name may lead to misunderstandings. Mr. HEINRICH LAMMASCH would like to stress the principle that the Convention does not deal with a superior judicial authority to which the parties will be subjected, but with judges to whom, according to their own pleasure, the parties will submit their disputes. At the time of the first reading, it was the first delegate from Brazil who, in eloquent terms declared himself a partisan of this opinion. Mr. HEINRICH LAMMASCH would prefer to choose as a name: *"International Court of Arbitral Justice."*

[1] See Annex 85.

His Excellency Mr. **Ruy Barbosa** states he will abstain from discussing the project in view of the fact that the principle according to which the court is to be composed has not yet been defined, and that, therefore, the Brazilian delegation is not in position to state what attitude the Brazilian Government must take with regard to the new institution.

Their Excellencies Messrs. **Gonzalo A. Esteva** and **Beldiman,** his Excellency Baron **Guillaume** and Mr. **Georgios Streit** declare that for the same reason they must refrain from taking part in the discussion.

Special record is made of the declarations of these delegates.

Mr. **James Brown Scott** reminds the members that the committee has expressed the desire that the new institution may be placed alongside of that of 1899 and of the Prize Court without in the slightest manner assuming the nature of a court superior to the two just named. While at the same time the sphere of activity of this court is somewhat different from that of the Court of 1899, the authors have desired to express by the name that the new court would be a judicial institution. On this account the name *International Court of Justice* was chosen and Mr. SCOTT would like to retain that name.

Mr. **Louis Renault** is of the opinion that the matter deals with a principle rather than merely with the choice of a name. He believes that it would be well to avoid confusion between the old Court of 1899 and the new international court of justice. The former bears an entirely arbitral character, whilst the latter approaches the nature of a judicial institution, because the judges are designated in advance once and for all.

His Excellency Sir **Edward Fry** concurs in the remarks of Mr. LOUIS RENAULT.

Mr. **Heinrich Lammasch** believes that the explantions given by Mr. SCOTT will, to certain members, make acceptance of the new institution more difficult. The Austro-Hungarian delegation considers it of the highest importance that the court should not set itself up higher than the parties as a power superior to them. If it is true that the court is organized in advance and once and for all, it will be so organized, nevertheless, by the parties themselves, and, therefore, remain an arbitral institution.

His Excellency Mr. **Ruy Barbosa:** Obliged to abstain from voting in this deliberation for the reason which I stated at the opening of the meeting, I should take no part in the debate, if it were not to yield to the nominal call with which our eminent colleague, Mr. LAMMASCH, has honored me. The third edition of the Anglo-Germano-American project retains for the new institution the name of International Court of *Justice.* In this connection, our honorable col-
[659] league referred in rather kindly terms to the remarks I submitted in another meeting.

I have certainly not forgotten them, the more so because, if my memory does not fail me (and I am quite sure of its accuracy), the principal author of the project consented to a compromise upon this point by telling us that he renounced the baptismal name of his progeny.

I do not know for what reason this concession was not accepted. Nevertheless, we were not dealing with the choice of a baptismal name, but with a juridical question concerning the use of an illegitimate name. And it was not long before this was realized; it occurred, shortly afterwards, when we discussed the exigency of the *compromis.* Is not the *compromis* a specific feature of arbitration? Have judicial institutions nothing to do with a *compromis?*

Yet, from what we see in the project, the tendency is to replace the idea of arbitration by that of justice, by associating with it the arbitral institution of the *compromis*. Therein lies the hybrid character of the system of the project.

With the idea of defending it, Sir EDWARD FRY has just told us: Arbitration and justice are but one and the same thing: it is justice alone which we seek in arbitration.

Gentlemen, it is true that in the last analysis, justice and arbitration are blended in the same idea: the idea of the admission of right between two contradictory pretensions. Arbitrators judge; they mete out justice; their decisions go under the name of sentences. All these are elementary notions. Everybody understands that.

Nevertheless, and in spite of that fact, there is, juridically speaking, a difference between judicial magistracy and arbitral magistracy, a distinction such as would make it impossible ever to confuse the one with the other, without introducing uncertainty and confusion into the heart of the most necessary principles for the organism of justice and the régime of procedure.

Bear in mind the laws that have been passed in all countries. They consecrate justice. They authorize arbitration. The two institutions exist alongside of each other by helping one another, by taking one another's place, by occasionally becoming intertwined, but without destroying each other, and without ever becoming joined in one. This it is that proves their irreducible diversity, and, at the same time, their necessary parallelism; for if between them there were a substantial identity, this contact would have resulted in uniting them in one, and a universal practice would not, for centuries, have clung to the futility of this twofold use.

Hence, justice and arbitration are both indispensable. Both have their legitimacy, their function, and their character. But in what way do they differ from each other? First of all, as to the source whence they come. Next, as to the social element that nurtures them. And lastly, as to the juridical form which they assume.

The juridical form of justice is permanent and inalterable. It is the law that establishes it. With regard to arbitration, the juridical form is variable and casual. It is the agreement between the parties which decides that form. Justice emanates from sovereignty and imposes itself upon obedience. Its organs are created by power. The parties must submit to it. Arbitration, on the contrary, has its source in liberty. It is the work of a convention; it has no other authority except that admitted by the contractants, and its magistrates are those voluntarily chosen.

This is the reason why the judicial form of justice is that which is preferable in regard to the relations between individuals, and why the arbitral form is the only one applicable between the nations. The latter submit only to the authorities that they have constituted among themselves. To substitute justice in the place of arbitration would, so far as they are concerned, be to replace voluntary consent with constraint. In this way an international judicial power would be created.

In taking one further step an international executive power would [660] be established and maintained until a universal legislature had been reached. This would mean the constitution of the United States of the World.

But every constitution implies a sovereignty over those submitting to the laws enacted in conformity to it. If you organize international powers, it will

be necessary to arm them with instruments efficacious against revolt. There would be rebel nations. Repression would, therefore, have to be imposed. Upon whom would this function devolve? Most naturally upon the strongest nation, or upon a concert of the strongest. What would be its final result? Why, it would simply mean legalizing the domain of force, by substituting it in the place of the balance of sovereignties. And thus the idea of peace carried to the extreme, in the belief that it would encompass justice instead of arbitration, would end by putting might in place of right.

Therefore it is not progress which has been suggested to us. It is an innovation dangerously reactionary in its tendencies and in the perspective of its results. Progress there will ever be in arbitration. We must ever develop it. But to develop it more and more, we must not change its nature.

If arbitration were affected in its nature, it would certainly lose general confidence. But confidence is that human element, that social element to which I referred, and by which arbitration is fostered. Arbitration thrives on confidence. Jurisdiction thrives on obedience. Nations do not obey: they choose, they trust.

You are departing from the idea of arbitration in moving toward jurisdiction. As a result you will reap the distrust of the States. But when already we have on our hands difficulties such as those the weight of which we feel in this matter of obligatory arbitration, it seems to me that it would not be desirable to create new difficulties. Nor would it be good policy. On the contrary, it would be best to make arbitration more acceptable to the nations standing in fear of it, instead of arousing against it even more legitimate apprehensions than those which exist already.

His Excellency Mr. **Martens** believes that everyone is agreed that the new court is to be an arbitral institution. He suggests, in the first place, the creation of a new general title of "arbitration," and, in the next place, he would refer to the two courts under two separate titles.

His Excellency Mr. **Beldiman** calls attention to the fact that the discussion which has just taken place clearly shows that there exist divergences, divergences not only of form but of principle as well, between the opinions of Messrs. Scott and Lammasch, and even between those of the authors of the project.

Mr. **Kriege** states that the essential matter of the institution lies in the competence and not in the name.

After an exchange of views, the **President** proposes to reserve the matter of the name until after an agreement shall have been reached at the close of the second reading. When the house shall have been built, we shall grace it with the name which it deserves.

His Excellency Mr. **Mérey von Kapos-Mére** agrees with the President. He suggests the title of "arbitral jurisdiction" instead of "arbitral justice," and he submits two further arguments in support of the opinion of the Austro-Hungarian delegation. In the first place, the two courts have for their purpose the same arbitral mission. In the second place, it seems to him that after the discussion which has just closed, the elimination of the word "arbitral" would mean the negation of the arbitral nature of the new court.

In agreement with the authors of the project, the question is reserved.

[661] His Excellency Mr. Mérey von Kapos-Mére recalls that at the first reading there had seemed to be a general agreement to replace the words

"alongside of the Permanent Court of Arbitration" with *"while maintaining at the same time the present court."* This phraseology seems to him to establish more clearly the complete retention of the old institution and its connection with the new court.

His Excellency Mr. **Eyre Crowe** believes that the phraseology of the project expresses the same idea in a more precise manner.

The proposition of Mr. MÉREY is adopted by six votes (Germany, Austria-Hungary, China, Italy, the Netherlands, Peru).

The whole of Article 1 is then adopted by nine votes (Germany, Austria-Hungary, United States of America, France, Great Britain, Italy, the Netherlands, Peru, Russia).

ARTICLE 2

The International Court of Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present Convention.

Mr. **Kriege**: To follow out the suggestions of the committee, there was inserted in paragraph 2 of the article the "moral clause" for the judges, to the effect that the judges must be chosen from persons of the highest moral reputation.

The **President** would like to receive explanations with regard to the term: "high legal posts" in the first paragraph.

Mr. **Kriege** explains that the judges of the international Court should possess the qualifications for appointment to the highest courts of their respective nations. There are certain States in which eligibility to the various judicial offices is governed by requirements of various kinds and degrees. If we should not require that an international judge possess all of the judicial qualifications required of the justices of the supreme court of his own country; if we should confine ourselves to prescribing that the judges fulfill the conditions required for appointment to a judicial office, it would, theoretically, be possible to send to the court persons who do not possess the competence without which its important duties cannot be performed. In some countries, for instance, persons who have not even read law may be appointed to the office of justice of the peace. It is obvious that such a magistrate should not sit on an international bench.

His Excellency Baron **Marschall von Bieberstein,** along this same line of thought, reminds the members that in certain countries judges of the inferior courts are elected.

Mr. **Louis Renault** states likewise that we must distrust the caprices of election which, in certain countries, place in the judicial seats persons
[662] not always possessed of the necessary guaranties of knowledge and impartiality. We must leave such matters to the Governments who will be circumspect in their choice. The project contains a moral indication for the Governments in prescribing that they shall appoint only persons capable of exercising the highest judicial functions in their country.

His Excellency Mr. **Martens** thinks it would be well that the Governments should communicate to the International Bureau the service records of the judges appointed by them.

Mr. **Louis Renault** fears that such communications might give rise to criticisms of the other Governments concerning the personality of the judges.

His Excellency Mr. **Martens** is of opinion that a communication of mere service records does not lead to any criticism.

His Excellency Mr. **Nelidow** concurs in the view expressed by Mr. MARTENS.

The **President** states that the report will contain a mention of the remarks that have just been made.

Article 2 is adopted.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a period of twelve years.

(*Adopted without remarks.*)

ARTICLE 4

The judges of the International Court of Justice are equal, and rank according to the date on which their appointments were notified (Article 3, paragraph 1), and, if they sit by rota (Article 7, paragraph 2), according to the date on which they entered upon their duties. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

Mr. **Kriege**: A second paragraph has been added to this article containing a general rule concerning the position of deputy judges. This rule is identical with that contained in the project for the Prize Court.

Paragraphs 2 and 3 of Article 4 of the second edition of the project constitute the new Article 5.

The article is adopted without remarks.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

[663] Mr. **Heinrich Lammasch** thinks that it would be advantageous to define more clearly here the words "outside their own country."

It is possible that a State may choose as judge a citizen or subject of another State; and in this case it would be necessary to stipulate in Article 5 that "their own country" means "the country of origin."

The question raised concerning the recognition of diplomatic privileges to diplomatic agents not *ressortissants* of the country in whose service they have entered, is only too well known.

Mr. **Kriege** believes that it will suffice to refer in the report to the remark made by Mr. HEINRICH LAMMASCH, and he asks that the phraseology of paragraph 1 of Article 5 which reproduces the text of 1899 be not modified.

Upon a remark by his Excellency Sir **Edward Fry,** Articles 6 and 7 of the project, which are closely related to the distribution of the seats of the tribunal among the different Powers, are reserved.

ARTICLE 8

If a Power in dispute has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of the case. Lots are then to be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other party in dispute.

If several Powers act together in the same suit, the preceding provision is not applicable except in the case where none of them has already a judge sitting in the Court. If none of them have already a judge sitting in the Court, it is the duty of the said Powers to come to an understanding, and, if need be, to draw lots for the nomination of the judge.

Mr. **Kriege:** Article 8 reproduces the German proposition that each Power must be represented in the court when it is a party to the dispute, a proposition which had been accepted by the delegations from Great Britain and the United States.

Paragraph 2 contemplates the case when several Powers act jointly in the same dispute. It does not seem necessary to seat a new judge. The representation of such Powers by a single judge seems sufficient.

If, on the contrary, none of the Powers acting jointly has any judge sitting in the court, they must come to an agreement among themselves as to which one shall have the right to seat its judge.

Mr. KRIEGE asks that Article 8 be reserved so that it may be discussed along with Articles 6 and 7.

His Excellency Mr. **Asser** believes that paragraph 2 of Article 8 is incomplete. It affords a solution for the case when none of the parties in dispute should have a representative in the court; but the case may be readily foreseen when one Power should have a dispute with two or several other Powers that might already be represented by one, two, or even more judges appointed by them.

Is it just and conformable to the principle which dictated this article to allow this inequality to exist? Would it not be better to stipulate that the parties with a common interest shall in no case be represented by more than one single judge?

Mr. **Kriege** fears that a provision of this kind would greatly complicate the organization of the court with regard to its composition.

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ARTICLE 9

The Court annually nominates three judges, who form a special commission during the year, and three more to replace them should the necessity arise. They are balloted for. The persons who secure the largest number of votes are considered elected. The commission itself elects its president. If need be he shall be drawn by lot.

Only judges who are called upon to sit can be appointed to this commission. A mem-

ber of the commission cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant,* is one of the parties.

The members of the commission are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

Mr. **Kriege:** In accordance with a suggestion of the committee the name *"special committee,"* has been replaced by that of *"special commission."* Paragraph 1 of the article determines, furthermore, the manner in which the Commission is to be elected.

To meet another suggestion of the committee, a provision has been introduced in paragraph 2 of this article stating that a member of the Commission may not exercise his functions when the Power within whose jurisdiction he comes is one of the parties.

The **President** remarks that the words *"if need be"* may be misunderstood. What do they mean here?

Mr. **Kriege** replies by saying that those words contemplate the hypothesis of an even distribution of the votes concerning the name of the three members of the special commission when they elect their president.

Mr. **Eyre Crowe** suggests that it be worded *"in case a majority is not obtained."*

The committee adopts this new phraseology.

His Excellency Mr. **Martens** believes that the expression "special commission" is subject to the same criticism as that of *"special committee";* he proposes *"special tribunal."*

Mr. **Eyre Crowe** remarks that the word *"tribunal"* has already been used in a different meaning by the Convention of 1899.

Mr. **Kriege** remarks in his turn that the expression "special commission" has already been adopted by the committee charged with the study of a project concerning the Prize Court.

His Excellency Mr. **Martens** believes that it would be well to state in this place *expressis verbis* that the members of the special commission are entitled to reelection.

Special record is entered of the remark made by his Excellency Mr. MARTENS, and it will be taken into account in the next draft.

The **President** referring to paragraph 3 of the article believes that it would be easy to suppose as a result of the provisions contained in Article 9 that two special committees will sit together during a certain time, one in virtue of paragraph 3, and the other in virtue of paragraph 1.

Mr. **Kriege** declares that this presumption is quite possible, but the authors of the project think that since the matters which might be submitted to the Commission are of such a nature that they could be quickly settled, it would be well to permit the judges who have taken them in hand to settle them as well.

[665] His Excellency Mr. **Asser** believes that the period of one year is too short. International disputes can be settled only within a certain time and it is important that the judges should receive a mandate of a longer duration.

Mr. **Kriege:** The judges will hold in the special commission a very peculiar position and their functions will be of a very delicate nature. The court must therefore be given opportunity to form an estimate of their respective activity

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and fitness, and the facility of replacing them within a comparatively short period. If any member stands the test, the court may, by reelecting him, avail itself of his experience.

His Excellency Mr. **Asser** repeats that to his mind the period is too short, even to ascertain the capacities of a member of the tribunal. He fears, moreover, that continual changes brought up by an excessive desire to replace the present members might be harmful to the institution itself.

Mr. **Kriege** presents two more arguments in favor of maintaining the present period.

The authors of the project thought it advisable to enable eminent and busy men to serve on the Commission without relinquishing their high positions at home, which would undoubtedly be the case if they had to occupy their seats for more than one year.

It is necessary, moreover, to consider the rotation and enable the judges who are to occupy their seats for one year only to serve on this Commission.

His Excellency Mr. **Asser** thinks that the committee will have to handle many affairs and that it would be imposing a great sacrifice upon the members of the court if they were thus indirectly compelled to give up old functions in order to sit at The Hague during the period of only one year.

The question is reserved.

His Excellency Mr. **Mérey von Kapos-Mére** fears that the words *"during the year"* in paragraph 1 of the article may lead to a misunderstanding, since the commencement of the functions of judge has not yet been provided for, and he proposes to replace it with the words *"during one year."*

Upon the proposition of the **President,** the committee decides to omit altogether the words *"during the year."* The beginning of the paragraph clearly enough indicates that the function of these judges will continue only during the period of twelve months.

ARTICLE 10

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act there in any capacity whatsoever so long as his appointment lasts.

Mr. **Kriege:** The first paragraph of this article which contains the propositions of the delegations from the United States of America and Great Britain concerning the non-participation of the judges appointed by the Powers in dispute, has been suppressed.

[666] The **President** wonders if it is in this Convention that it would be appropriate to settle in a general way the rights and duties of the judges and if it would not be better to include these provisions in the Convention of 1899.

ARTICLE 11

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

The **President** states that the election of the President of the Commission for three years might lead to certain objections. Would it, after all, be impossible to give the presidency to a judge elected for only one year?

The authors of the project declare that they will take this observation into account.

ARTICLE 12

The judges of the International Court of Justice receive during the years when they are called upon to sit an annual salary of . . . . Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

While the Court is sitting, or while they are carrying out the duties conferred upon them by this Convention, they are entitled to receive a sum of . . . . florins per diem. They further receive a traveling allowance fixed in accordance with regulations existing in their own country. These provisions are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court, and are paid through the International Bureau created by the Convention of July 29, 1899.

Mr. **Kriege**: A new provision added to Article 12 settles the question as to whether or not the provisions concerning salaries to be allowed to the judges will be applicable to the deputy judges.

The provision which was contained in the old paragraph 3 concerning general expenses has been put into Article 33.

The **President** believes that it would give greater precision to the phraseology of the article if in paragraph 2 the words *"these provisions"* were replaced by *"the provisions of the present paragraph."*

Mr. **Eyre Crowe** proposes to insert into this article the sum of florins 100 per day already adopted for the project concerning the Prize Court, and the further sum of 6,000 Netherland florins as an annual allowance. This latter sum must be sufficiently high in order to permit of the acceptance of the judicial functions, but must in no way be a temptation for too large a number of candidates. The figure which he has just indicated seems to him to meet these two conditions.

His Excellency Mr. **Choate** believes that the amount is too small if one will remember that in order to sit in this court there will be judges who will have to undertake voyages as far as from China, Japan and South America.

Mr. **Eyre Crowe** remarks that the traveling expenses are paid over and above the salary allowance.

His Excellency Mr. **Nelidow** believes that the matter of the amount to be allowed the members of the court must be settled by the Governments themselves. The Conference can in that matter do nothing but offer suggestions.

[667] His Excellency Mr. **Mérey von Kapos-Mére** fully concurs in the view just expressed. He remarks, furthermore, that it is very difficult to form an opinion at present of the amount each State will have to meet, in view of the fact that general expenses will be unequally apportioned among the different Powers.

The committee decides to reserve this question.

The **President** puts to a vote the whole of Article 12, together with the amounts indicated therein.

This article is adopted by eight votes: Germany, Austria-Hungary, United States, France, Great Britain, Italy, the Netherlands and Peru.

His Excellency Mr. **Mérey von Kapos-Mére** states that at the first reading, he had proposed to express in the project the principle of the permanent office of the judges.

He finds that no attention has been paid to his remarks.

Mr. **Kriege** replies by stating that the authors of the project, after having examined anew the matter of the irremovability of the judges, reached the following opinion: In fixing the duration of the mandate of the judges at twelve years, the project declares in principle for the irremovability. But this does not mean that the judge might not be recalled by his State for important reasons, for instance, in case he had committed a criminal act. It would, nevertheless, be difficult to determine in a general way those cases in which the judges may be dispossessed of their functions, for the reason that it would be difficult to establish a system that would conciliate the various opinions. In view of the diversity of the legislations of the different countries, it has also been found impossible to prescribe that the judges might be removed only in those cases determined by the legislations of their countries. Moreover, such a provision would not have been of great importance because the main guarantee of the irremovability of the judges lies in the fact that the cases of recall are judged by a superior tribunal. There is no tribunal that might be charged with this task in regard to judges. Rather, it will be necessary that each Government should conscientiously decide with regard to the judge appointed by it.

His Excellency Mr. **Mérey von Kapos-Mére** states that it would be useless to determine all the cases entailing the recall of the judges. But it might be possible to include a general formula containing a reference to the national legislations.

The **President** states that the question resolves itself into finding out if, in case of necessity, the right of a Government to recall its judge before the expiration of his mandate could be ascertained.

Mr. **Louis Renault** states that the text of the project implicitly declares the principle of irrevocableness, since it fixes the duration of the mandate at twelve years and provides for the substitution of the judges only in case of death or resignation; still, this rule could not be too absolute; if the Government that has appointed a judge recalls him and appoints another one, the new appointment will always be valid. To be sure, this recall might sometimes be arbitrary and incorrect from the international point of view, but the only guarantee against abuse lies in the moral responsibility of the Governments.

His Excellency Baron **Marschall von Bieberstein** states if dismissal is justified in accordance with the national laws, the recall will always be held to be correct. As regards abuses, they will hardly be in the interest of the Governments.

[668] His Excellency Mr. **Mérey von Kapos-Mére** declares that all these considerations are no objection to the adoption of the general formula which he proposes. His Excellency Mr. MÉREY VON KAPOS-MÉRE would surround the judges of the international court with all the guarantees which they enjoy in their countries by protecting them against arbitrary recall on the part of their Governments.

His Excellency Mr. **Martens** supports the proposition of Mr. MÉREY. In

the interest of the new court, it is necessary that its members should be as independent as those of the old court.

The **President** declares that he is primarily concerned with the prevention of the possibility of a recourse in annulment against a decision of the international court, based upon the fact of the appointment of a new judge. The thesis of right must be clearly indicated in the report.

His Excellency Mr. **Nelidow** proposes to include the causes of the dismissal of the judges in the term "unworthiness."

Mr. **Louis Renault** asks who will be the judge of this unworthiness.

Mr. **Heinrich Lammasch** suggests the stipulation that the judges of the court shall have forfeited the right of their office whenever they shall cease to fulfill the conditions indispensable for their appointment.

His Excellency Baron **Marschall von Bieberstein** objects by saying that the ascertaining of the loss by a judge of the qualities required for his nomination will certainly be reserved to his Government which will be able to act in full freedom. The proposal of Mr. LAMMASCH offers, therefore, no supplementary guarantee.

His Excellency Mr. **Nelidow** proposes to give to the court itself the right to pronounce itself as to the unworthiness of its members.

The **President** puts to a vote the proposition submitted by Mr. MÉREY VON KAPOS-MÉRE.

Voting for, 3: Austria-Hungary, Italy, Russia.

Voting against, 5: Germany, United States, Great Britain, the Netherlands and Peru.

Abstaining, 11.

His Excellency Baron **Marschall von Bieberstein** proposes the stipulation that the Governments are obliged to notify each other of the reasons that have induced the recall of this or of that judge of the International Court.

The **President** declares that this proposition is nearly the same as the one presented by his Excellency Mr. NELIDOW, without, however, going so far as to leave the final decision with the court itself.

Mr. **Kriege** believes that there would be obstacles to the giving to the court itself the right to pronounce itself with regard to the unworthiness of its members. It might have a fatal influence upon the personal relations among these members. It might so happen that a judge would continue to sit with colleagues who might have voted for his recall but had remained in the minority.

His Excellency Mr. **Nelidow** replies by stating that the vote should be secret. Furthermore, what he said was merely a suggestion.

[669] The **President** consults the committee with regard to the *principle* of the notification as proposed by Baron MARSCHALL.

Voting for, 4: Germany, Austria-Hungary, the Netherlands, Russia.

Voting against, 4: United States of America, Great Britain, Italy, Peru.

Abstaining, 11.

The proposition is not adopted.

His Excellency Mr. **Choate** proposes to add to Article 3 a paragraph declaring that the judge shall have lost his office in case of *permanent incapacity.* He means by this expression only physical incapacity.

Voting for, 3: United States of America, the Netherlands, Peru.

Voting against, 4: Germany, Austria-Hungary, Italy, Russia.

Abstaining, 12.

The proposition is not adopted.

Articles 13, 14 and 15 are adopted without remarks.

ARTICLE 13

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 14

The seat of the International Court of Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The special commission (Article 9) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 15

The Administrative Council fulfills with regard to the International Court of Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 16

The International Bureau acts as registry to the International Court of Justice and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

[670] Mr. **Kriege**: Article 16 has been modified in agreement with the resolutions adopted by the committee of the second subcommission relative to the project for the International Prize Court. Especially, a further provision has been added concerning the appointment of secretaries, translators and stenographers.

ARTICLE 17

The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The session does not take place if the special commission decides that business does not require it. The commission has also the right to summon the Court in extra session.

Mr. **Kriege**: Modification of this article is the result of the suggestions made by the committee. Usually the court is to meet but once a year. But the Commission will have the right to call the court into extraordinary session; it will also be authorized to decide that no session shall be held if, in its opinion, business does not call for it.

His Excellency Mr. **Martens** asks if the "special commission" has the right to call the court, whenever it deems it best.

Mr. **Kriege** states that the question will be treated of in greater detail in the regulation concerning the internal organization of the court.

His Excellency Count **Tornielli** remarks with regard to the same article that the Commission may decide that the business does not require the convocation of the court. It may well happen that certain cases will remain in abeyance. This power of the Commission seems to him arbitrary.

Mr. **Kriege** believes that this also is a question which should be reserved for the regulation regarding the internal organization.

The **President** proposes to phrase the matter as follows:

> The session does not take place if the Commission decides that no cases are in proper shape to be taken up.

His Excellency Count **Tornielli** accepts this phraseology.

Article 17 is adopted saving its phraseology.

ARTICLE 18

The special commission addresses every year to the Administrative Council a report on the doings of the Court. This report shall be communicated to the judges and deputy judges of the Court.

Mr. **Kriege:** It seems desirable that all the judges of the court should always be informed of the state of the labors of the court. Conformably to a suggestion made in the committee itself, the provision of Article 18 was included in the project.

Apropos of this Article 18, his Excellency Mr. **Martens** would like to know if in the opinion of the authors of the project, the Administrative Council is entitled to criticize the labors of the court.

After an exchange of views between his Excellency Mr. **Martens,** the **President,** Mr. **Kriege** and his Excellency Mr. **Mérey von Kapos-Mére,** it is decided that the report of the commission shall be a mere account of those labors.

Article 18 is adopted saving its phraseology.

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ARTICLE 19

The judges of the International Court of Justice can also exercise the functions of judge in the International Prize Court.

Mr. **Kriege:** In Article 17 of the old project a place had been reserved for the provisions destined to regulate the relations between the International Court of Justice and the International Prize Court. The gap has been filled by the provision of the present Article 19. The judges of the International Court of Justice may also be appointed to judicial functions in the Prize Court. Other provisions establishing a connection between the two courts do not seem to us to be useful.

The meeting closes at 6 o'clock.

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SEVENTH MEETING

SEPTEMBER 5, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10: 15 o'clock.

The minutes of the sixth meeting are adopted.

The program of the day calls for the discussion of Articles 20 and following of the project of a Convention relative to the establishment of an International Court of Justice.[1]

ARTICLE 20

The International Court of Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

(*No remarks.*)

Mr. **Kriege**: The phraseology of this article has been modified in accordance with the decision of the committee.

ARTICLE 21

The special commission (Article 9) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part . . . . of the Convention of July 29, 1899, is to be applied;

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the Court is entrusted with such inquiry by the parties in dispute acting in common agreement. With the assent of the parties concerned, and as an exception to Article 10, paragraph 1, the members of the commission who have taken part in the inquiry may sit as judges, if the case in dispute should be the subject of an arbitration either of the Court or of the commission itself.

Mr. **Kriege**: The provisions of this article have undergone some slight modifications of phraseology. One single modification of principle has been introduced into paragraph 2 of the article to meet a suggestion made by
[673] Mr. RENAULT. According to the second sentence of this paragraph, those members of the commission who have taken part in the inquiry may sit as judges, if the dispute becomes the object of arbitration either by the court or by the commission itself.

His Excellency Mr. **Asser** calls attention to the fact that the wording of No. 1 of Article 21 seems to limit the freedom of the parties to entrust to the delegation the solution of their disputes. He believes that in this respect full

[1] Annex 85.

liberty must be left to the Powers, and that the competence of the delegation must not be made dependent upon the choice of summary procedure.

His Excellency Mr. Asser proposes, therefore, to substitute in the place of the words *"that the summary procedure is to be applied,"* the expression *"to submit to the jurisdiction of the delegation."*

His Excellency Mr. **Martens** concurs in this view and adds that the parties must not be forbidden, in certain circumstances, to prefer the delegation to the court.

Mr. **Eyre Crowe** thinks it has been the intention of the authors of the project to restrict the competence of the delegation to certain classes of cases, and he fears that the nature of the court will be seriously altered if the delegation is given the same competence as that possessed by the court.

Messrs. **Kriege** and **James Brown Scott** support the remarks of Mr. Eyre Crowe.

His Excellency Mr. **Asser** repeats that he sees no reason for depriving the parties of the right to choose the delegation in order to settle a juridical question. He adds that it seems strange to him that for this case an exception should be made to the principle which constitutes the basis of any arbitral procedure, the freedom of the parties to depart from all the rules included in the Convention.

Mr. **James Brown Scott**: The delegation of the United States of America cannot accept the proposition of his Excellency Mr. Asser. It desires to establish a court of justice and not a special committee to be endowed with the same powers and jurisdiction as the court; it therefore must reject a provision which would strip the court of all its authority and leave it nothing but the annual election of the three members of the delegation.

His Excellency Mr. **Asser** thinks that if such is the purpose of the authors of the project, it is in no way affected by the wording of No. 1. For it would be necessary to limit the competence of the delegation by specifying the nature of the cases which may be submitted to it, and not by imposing the choice of summary procedure upon the parties. The great difference between summary procedure and the ordinary procedure lies in the manner of constituting the tribunal, and when a case is submitted to the delegation there is no tribunal to be constituted.

The **President**: The question now raised is that of the character to be given the jurisdiction of the delegation—shall its jurisdiction be limited to certain matters or should we assign to it general functions? The authors of the draft think that this latter theory is dangerous; I partake of their opinion; it is necessary here to proceed with prudence and to postpone increasing the functions of the delegation; we should not risk lessening the importance of the court at the outset.

His Excellency Mr. **Martens** declares that it is certainly not his intention to decrease the importance of the court. In view of the fact that it is
[674] still very difficult to specify what may be understood by summary procedure, he proposes to await the report of the committee C which has at present before it a project upon this matter which was submitted by the French delegation.

Mr. **Guido Fusinato** states that the distinctive feature of summary procedure resides, in fact, in the manner of constituting the tribunal.

His Excellency Sir **Edward Fry** observes that if the parties desire to sub-

mit their dispute to the members of the delegation, they may choose them like all the other members of the present court to constitute an arbitral tribunal.

Mr. **Guido Fusinato** wonders if paragraph 2 of Article 10 does not forbid the judges of the court to act in a special tribunal. According to this provision, they could indeed not "*act* there in any capacity whatsoever."

Mr. **Kriege** states that Article 10 intended that the judges should not act in an arbitration tribunal, in any manner whatever, as representatives or in the interest of a party.

The **President** calls attention to the fact that *to act* does not mean to judge. Paragraph 2 of Article 10 refers only to functions of agents and pleaders which it forbids the judges while their mandate continues.

Mr. **James Brown Scott** states that in the first wording of the project the possibility for the judges to sit both in the court and in any other arbitral jurisdiction had been clearly expressed. The authors of the project have deliberately suppressed this provision.

Returning now to the proposition offered by Mr. ASSER, he states again that his delegation does not desire to create two juxtaposed courts of which one, the more important, might be disregarded.

His Excellency Mr. **Asser** asks that discussion concerning competence be adjourned until after committee C shall have presented its report.

Mr. **Eyre Crowe** says that while Article 21, paragraph 1, does restrict the freedom of the parties, this is in the interest of the court itself. The court's decisions are destined, in the authors' opinion, to create a jurisprudence and gradually to develop international law by the authority of its judgments. It would, therefore, he thinks be very unwise to endanger the authority of its decisions by permitting a small committee of three members to pass upon questions of great importance.

Mr. **Heinrich Lammasch** does not share the fears of Mr. FUSINATO concerning the phraseology of Article 10, but he thinks that it would be possible entirely to satisfy him by reading the first part of the sentence in the following manner: "or to act there for one or the other of the parties in any capacity whatsoever," etc.

This addition is adopted.

Mr. HEINRICH LAMMASCH declares that in so far as the matter of competence raised by his Excellency Mr. ASSER is concerned, he is in favor of retaining the present phraseology of Article 21.

The composition of the delegation in the manner in which it will be established by the election, will not fail to have somewhat of a fortuitous character, and it is, therefore, proper in these conditions to restrict its functions.

The **President** consults the assembly with regard to the adoption of Article 21.

Their Excellencies Messrs. ASSER and MARTENS maintain their reservations.

There is no other objection offered.

[675] The PRESIDENT declares that Article 21 has been adopted provisionally.

It will be necessary to take it up again when committee C shall have completed its report.

The committee passes on to Article 22.

ARTICLE 22

The special commission is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic agreement in the case of:

1. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

Proposal of the German delegation

2. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either expressly or by concrete stipulations, excluding the settlement of the *compromis* from the competence of the special commission. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration.

Mr. **Kriege**: This article deals with the matter of the establishment of the *compromis* by the special commission. Under paragraph 2 of the article, two cases have been foreseen in which it devolves upon the Commission itself to settle the *compromis,* if the request is made by only one of the parties. The first paragraph deals with contract debts. The vote upon the latter had been reserved until after the discussion of the proposition of the United States. Nevertheless, it has appeared useful to add, even now, a provision which might perhaps be regarded as self-evident, that is to say, that the competence of the commission cannot be invoked in case a Power, while yet accepting the offer of arbitration, has, nevertheless, subordinated this acceptance to the condition that the *compromis* should be settled in some other manner.

Paragraph 2 of the article reproduces the proposition of the German delegation dealing with the establishment of the *compromis* in case the parties are bound by a general arbitration treaty. In it you will notice a change of phraseology and a change which affects the vital part of the matter. The new phraseology was agreed upon in common accord with the Austro-Hungarian delegation which, in the last meeting of the committee, had submitted an amendment to the German proposition.

The vital change is of the following nature. The provision will be applied only to treaties which will be concluded or renewed beginning with the putting into force of the Convention, and not to treaties already existing. Thus modified, the paragraph dealing with the "obligatory *compromis*" may, I hope, secure also the votes of those who think that in its original form this provision did not sufficiently respect the liberty of the parties.

[676] His Excellency Mr. **Choate** states that the delegation from the United States of America may now accept this article in view of the fact that there has been removed from it that character of constraint which it previously contained.

Mr. **Guido Fusinato** believes that the expression "*not either expressly or by concrete stipulations*" can lend itself to further misunderstanding and to confusion. He feels convinced that now everyone is agreed as to its real mean-

ing: "expressly" contemplates the explicit provisions contained in the treaties, and referring directly to the competence of the court. As for "concrete stipulations," these are the special provisions foreseeing the case of prevention of the conclusion of the *compromis* and which, therefore, exclude the competence of the special court.

Mr. Guido Fusinato then proposes to replace this expression by the words "*not either explicitly or implicitly.*" (*Approval.*)

His Excellency Mr. **Martens** calls for explanations regarding the scope of the last sentence in paragraph 2 of Article 22.

Mr. **Kriege** states that the last sentence of the article contemplates two cases: first, the case when one of the parties thinks that the contended matter does not come within the scope of the arbitration treaty; the second hypothesis is that, while admitting that the dispute comes within the arbitration treaty, the party invokes one of the reservations made in this treaty, for instance, the clause of honor or of vital interests.

In the opinion of the authors of the project, the delegation could never settle a controversy in one of these cases without the previous consent of the parties.

Mr. **Guido Fusinato** calls attention to the fact that in a previous sitting he had offered some objections to paragraph 2 which had been submitted by the German delegation. It was for the purpose of satisfying the German delegation that the Austro-Hungarian delegation had offered an amendment. Does the latter intend to persist in that course?

His Excellency Mr. **Mérey von Kapos-Mére** replies by stating that if the committee is willing to accept the new phraseology of the German proposition he will not insist upon a vote upon his amendment.

Mr. **Kriege** states that it is agreed that the last sentence may not be applied, if in accordance with the arbitration treaty it devolves upon the arbitral tribunal to decide whether or not the dispute comes within the scope of the treaty, or whether it will be necessary to apply the reservation relative to honor, etc. He does not believe that it is necessary to mention expressly this eventuality, all the more so because in its present form the provision is directed only to the treaties to be concluded and does not relate to treaties now existing.

Mr. **Guido Fusinato** admits that the objection is much less serious, but it still holds.

His Excellency Mr. **Asser** proposes the words "*nevertheless, the recourse is not necessary if one of the parties availing itself of a right stipulated by the treaty. . . .*"

Mr. **Kriege** remarks that this phraseology presents the inconvenience of presuming that the will of the parties is that, save express stipulation, the delegation will have the right to settle controversies relative to matters concerning the honor and the essential interests.

Article 22 is adopted in its present phraseology.

[677] Article 23

The parties concerned may each nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the commission.

If the commission acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

Mr. **Kriege**: Upon a motion by Mr. Asser this article has been completed with a provision declaring that the expenses occasioned by the addition to the commission of persons taken outside of the judicial panel of the court will not constitute a part of the general expenses of the court, but shall be borne by the parties who have chosen such persons.

His Excellency Mr. **Asser** recalls that even at the first reading, he asked that more precision should be given to the scope of the provision contained in paragraph 1 of this article. He now proposes the following wording:

Each party, if it so desires, may nominate a judge. . . .

The article is adopted with this modification in the text.

Article 24

The contracting Powers only may have access to the International Court of Justice set up by the present Convention.

Mr. **Kriege**: The initiative for the provision of the new Article 24 is likewise due to Mr. Asser. It restricts the competence of the court to the disputes that have arisen between the Powers that are parties to the Convention. This seemed necessary because, access to the court being gratuitous, the expenses are borne in common by the contracting Powers, and further because it seems hardly warranted to make them also responsible for the expenses, perhaps very considerable, that might be occasioned by an instance in which other Powers not included among the contracting Powers might take part.

In answer to a remark by the **President** it is agreed that the expression "*contracting Powers*" likewise includes those Powers that may subsequently adhere to the Convention.

Article 25

The International Court of Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

(*No remarks.*)

Article 26

The Court determines what language it will itself use and what languages may be used before it.

In cases laid before the special commission, the decision rests with this commission.

Mr. **Kriege**: The provision of this article is taken from the project concerning the Prize Court. It appears necessary because it would be difficult
[678] to impose upon a court composed of seventeen judges the use of a language chosen by the parties.

Article 27

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of 1899.

Mr. **Kriege**: Under Article 39 of the Convention of 1899 the acts and documents produced by the parties are to be communicated to the members of the tribunal of arbitration in the form and within the periods fixed by the tribunal.

Pursuant to the resolution of the committee of examination C, this provision will be modified so that in a general way the *compromis* will contain stipulations as to form and time in which the communication shall take place. This rule, however, does not appear to be applicable to proceedings before the court consisting of seventeen judges. It will be preferable to order that the International Bureau shall serve as a channel for all communications to be made to the judges of the court.

ARTICLE 28

For all notices to be served, in particular on the parties, witnesses, or experts, the court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Mr. **Kriege** states that no change has been made in this article, but in order to harmonize it with that which has been adopted in the project relative to the International Prize Court, it would be proper to add to it a fourth paragraph reading as follows:

> Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

(*Approval.*)

ARTICLE 29

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

(*No remarks.*)

ARTICLE 30

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

[679] The special commission reaches its decisions by a majority of the members, including those added in virtue of Article 23. When the right of attaching a member to the commission has been exercised by one of the parties only, the vote of the member attached is not counted, if the votes are evenly divided.

Mr. **Kriege**: The article has been completed by means of a new paragraph 3 containing a provision concerning the manner to be adopted in voting, when the number of members of the commission is even. This may occur in case one only of the parties avails itself of the right granted to it by Article 23.

In reply to a remark of his Excellency Mr. **Asser** it is agreed that the authors of the project will come to an understanding with regard to clearness to be given, in a special article, to all the provisions relative to procedure which shall be applicable both to the delegation and to the court.

ARTICLE 31

The judgment of the Court and the special commission must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

(*No remarks.*)

ARTICLE 32

Each party pays its own costs and an equal share of the costs of the trial.

Mr. **Kriege**: This article is new. Conformably to a suggestion made by his Excellency Mr. MARTENS, it puts the obligation of bearing the expenses of the instance upon the parties, provided they do not come within the class of general expenses.

The article is adopted.

ARTICLE 33

The general expenses of the International Court of Justice are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 7.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

(*No remarks.*)

ARTICLE 34

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

After the ratification of the present Convention, the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the special commission.

Mr. **Kriege**: Paragraph 2 of this article gives satisfaction to a proposition of Mr. ASSER. It has for its object to make certain that the operation of the court and of the commission shall begin at the earliest possible date.

Articles 35, 36 and 37 are adopted without remarks.

[680]

ARTICLE 35

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

ARTICLE 36

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 37

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

Mr. **Guido Fusinato** asks that in a general way reservation should be made of the right to introduce subsequently into the text already adopted any modifications that might be found necessary after committee C shall have presented its propositions. (*Approval.*)

His Excellency Mr. **Martens** remarks apropos of the expression *"special delegation,"* intended to replace that of *"special commission,"* that it would be preferable to use the single word *"delegation."* (*Approval.*)

It is decided, however, that the term *"special delegation"* will be employed in the first article of the project mentioning this institution.

His Excellency Sir **Edward Fry** proposes that the paragraphs of the articles of the project bear a special number. The solution is referred to the Drafting Committee of the Final Act.

His Excellency Mr. **Choate** takes up the matter of the salaries of the judges of the court.

The first delegate from the United States of America thinks that the sum of 6,000 florins per year, as proposed, is really too small. Too small salaries will unfortunately correspond to small judges. The average importance of the international judges will be reduced and the dignity of the court compromised. More generosity must be shown in order to secure the services of really competent men. International judges will frequently have to sacrifice very advantageous positions in their own country in order to perform their new functions. It is true that the project provides for other daily expenses, but the latter will have to meet the expenses of installation. Mr. CHOATE believes that it would be a great mistake to cling to the ridiculously small amount of 6,000 florins and he proposes that it be raised to 10,000 florins per year.

Mr. **Eyre Crowe** states that it must be borne in mind that for the judges of the high national courts the indemnification that may be [681] allowed them will be added to the salaries which they receive and will form a compensation for the obligation to displace themselves at any moment.

Baron **d'Estournelles de Constant** calls attention to the fact that apart from the national judges, recourse may also be had to lawyers and jurists whose incomes are usually very high.

Mr. **Heinrich Lammasch** calls the attention of the committee to the other side of the medal which Mr. CHOATE has just held up to view. He thinks that of all things consideration must be given to the honor which, for the international judges, results from the high functions to which they are called, and not to the importance of the salaries.

A very high salary might lead to covetousness, might lure candidates such as politicians without occupation.

In the very interest of the authority of the court it is well not to immeasurably increase the salaries of its members.

His Excellency Mr. **Nelidow** approves of the view expressed by Mr. HEINRICH LAMMASCH.

His Excellency Mr. **Mérey von Kapos-Mére** sets forth that the members of the special delegation who might sit for a period of about six months would have an annual revenue of between 20,000 and 30,000 florins because of the daily allowances.

Baron **d'Estournelles de Constant** persists in believing that the present amount eliminates those judges not having a personal income.

His Excellency Mr. **Mérey von Kapos-Mére** states that it is wrong to take into consideration great lawyers for whom a salary of 10,000 florins will be as unimportant as a salary of 6,000.

His Excellency Sir **Edward Fry** admits that there is danger in fixing a salary that is too high.

The **President** is of the same opinion.

The proposition of his Excellency Mr. CHOATE is not supported.

The **President** reopens the discussion as regards the name to be given to the new court.

Mr. **Heinrich Lammasch** emphasizes the fact that the matter affects the heart of the subject. It is true that Article 20 of the project sets into clear relief the arbitral nature of the court. It may, nevertheless, be feared that the new institution will develop in the sense of a court of justice to which the States might be subordinated even against their will. Mr. HEINRICH LAMMASCH states that if the "social contract" is no longer recognized as an historical truth with regard to the relations between individuals and State, it is, without any doubt, a present reality in the constitution of the fundamental relations between the States. We must, therefore, emphasize in the title of the new institution the sovereignty and independence of the States as admitted by the social contract, which is the basis of this new institution, by laying stress upon the arbitral nature of the court. Mr. HEINRICH LAMMASCH proposes, therefore, to name it "International Court of Arbitral Jurisdiction."

Mr. **James Brown Scott** accepts this designation in view of the fact that in the opinion of the delegation from the United States of America the title is not a matter of great importance.

[682] Mr. **Louis Renault** states that the expression of arbitral justice is the one used in the Convention of 1899. He believes that without any inconvenience whatever, the word "*international*" which makes the title sound too heavy, might be suppressed.

The **President** is in favor of the expression "*court of arbitral justice.*" The juxtaposition of the two expressions seems to him to express in a very happy manner the two principal ideas of the new institution. The word "justice" indicates the object which more and more it is sought to attain; the court will not primarily concern itself with weighing interests, but with deciding that which is right. On the other hand, the word "arbitral" brings out clearly the free and independent will of the parties.

His Excellency Mr. **Nelidow** proposes the title "*Permanent* Court of Arbitral Justice."

Mr. **Kriege** and his Excellency Mr. **Choate** declare themselves in principle as in agreement with Mr. HEINRICH LAMMASCH.

The **President** consults the committee in the first place about the expression: "*Arbitral Justice.*"

It is unanimously accepted.

Mr. **Guido Fusinato** states that it would be logical to give the title of "*permanent*" to the new court which is so in reality, instead of retaining it for the old court which is not permanent.

His Excellency Mr. **Asser** is of the same mind; moreover, he made the same proposition some six weeks ago.

The proposition of his Excellency Mr. NELIDOW (adding the word "permanent" to the title of the new court) is put to a vote and accepted by five votes against two.

The **President**: If this vote were final, it would be necessary to modify the title of the Court of 1899, and we have always carefully avoided touching it.

No doubt logic demands that the court should not be qualified as permanent, and that this term should be given to the new court, but we cannot unchristen the old before we know that we can construct the other.

Mr. **James Brown Scott** states that his delegation consents to the simple title, "A Court of Arbitral Justice."

A provisional agreement is reached in that sense. It remains, nevertheless, understood that the question may be brought up again after the submission of the report from committee C.

Mr. **Kriege** reads aloud the changes that have been introduced into Articles 1 to 19 of the project in conformity with the decisions reached in the last meeting of the committee.

Apropos of Article 17, his Excellency Mr. **Martens** brings up anew the question as to whether or not the delegation has the arbitrary right to convoke the court.

After some remarks by their Excellencies Messrs. **Nelidow**, and **Mérey von Kapos-Mére**, an agreement is reached to seek a phraseology which would offer guarantees against arbitrariness.

His Excellency Mr. **Mérey von Kapos-Mére** proposes to phrase paragraph 1 of Article 18 as follows:

> Each year the delegation communicates a statement upon the doings of the court to the Administrative Council who shall transmit it to the Powers through the intermediary of the international bureau.

[683] His Excellency Mr. **Martens** supports the proposal of Mr. MÉREY.

This proposal is accepted.

His Excellency Mr. **Mérey von Kapos-Mére** proposes to replace in paragraph 2, Article 21, the words *"in so far as the court is entrusted"* with *"in so far as the delegation is entrusted."*

After an exchange of views with Mr. **Kriege**, this phraseology is accepted by the committee.

The **President** declares that with the exception of the articles relating to the composition of the court (Articles 6, 7 and 8) all of the articles of the project are adopted.

His Excellency Mr. **Choate** reads in English the following address[1] which is translated by Baron D'ESTOURNELLES DE CONSTANT:

The committee has now reached a stage in its deliberations which marks a most important advance towards the creation of a permanent court of arbitration which shall satisfy the universal demand that presses upon us. We have decided with practical unanimity that there shall be such a court, and have adopted a constitution for its organization and powers with equal unanimity. It is true that the representatives of several Powers have declined to take part in the discussions involved in the second reading of the project until they should know what plan would be adopted for determining the number of the judges of the court and the mode of their partition among the nations. But I do not understand that even those nations find any objection to any feature of the project, and, in fact,

[1] See footnote, *post*, p. 689.

the observations which fell from them, and their acquiescence in the action of the committee on the first reading of the project, manifested an entire approval of it.

If the Conference could do no more than this, it would have made very marked progress in the work, for in the First Conference the very idea of the creation of such a court was promptly laid aside as impracticable, if not impossible. But we owe it to ourselves, and to the nations that we represent, not to let the work stop here, but, by a supreme effort for conciliation, to agree upon the important and vital subject of determining the number of judges and the mode of their distribution and the measure of their action. Whether we do this permanently or provisionally is not of very great consequence. To accomplish it in either way will make the Conference a very great success. If we fail to bring it about in one way or the other, the Conference itself will be to that extent a failure. And having come to The Hague accredited by the nations that sent us, we shall return to them seriously discredited.

It may, therefore, not be out of place for me, who originally introduced the proposition for the court,—which up to this point has been sustained with such general favor,—to review very briefly the various suggestions that have been made on this important subject.

When the subcommittee that had in charge the preparation of the project, consisting of one from each of the delegations—British, German and American, —had completed it, they attempted to devise a scheme, a possible scheme, which should serve as a basis of discussion and challenge the presentation of any [684] and every other scheme that any member of the committee might regard as possible. It was not even recommended by them for adoption, nor was it in any sense a joint scheme of the three Powers or a separate scheme of either—American, British, or German. It recognized and was based upon the equal sovereignty of the nations, and took account at the same time of the differences that existed between them in population, in territory, in commerce, in language, in systems of law, and in other respects, and especially the difference in the interests which the several nations would normally and naturally have at stake in the proceedings before the court and in the exercise of its jurisdiction. It provided for a court of seventeen judges, to be organized for a period of twelve years, and that of the seventeen, eight nations, who will be generally recognized as having the greatest interests at stake in the exercise by the court of its powers, should each have a judge sitting during the whole period of the organization.

It provided also that each of the other Powers should appoint, in the same way and at the same time, a judge for the same period, but who should be called to the exercise of judicial functions in the court for variously measured periods, according to their population, territorial extent, commerce, and probable interest at stake before the court, these measured periods ranging from ten years down to one.

By this method the absolute and equal sovereignty of each of the forty-five Powers was duly respected and their differences in other respects not lost sight of.

The presentation and distribution of this scheme, as an anonymous one, has answered the purpose of inviting abundant criticism and the presentation of counter-schemes. The main objection to it, held by many of the nations to whom it assigned less than a full period for the exercise of judicial functions by their

judges, has been that the failure to give to the judges appointed by each nation full power to sit all the time, was in some way a derogation from the dignity and sovereignty of each of them, and that the principle which recognized the equal sovereignty of each of the forty-five nations required a recognition of the claim that they were equal in all other respects. This claim, if insisted and acted upon, would of course render the establishment of an international court on any such basis of partition an absolute impossibility, and require a court of forty-five judges sitting all the time.

As was expected, a very interesting counter-scheme was proposed, based upon the alleged equality, not only in sovereignty but in all other respects, of all the States. It proposed to abolish the existing court, and for a new court to be constituted, consisting of forty-five judges, one to be appointed by each State, and these to be divided into groups in alphabetical order, of fifteen each, which were to sit for alternate periods of three years. This scheme was offered as an illustration of what was possible, based upon a recognition of the absolute equality of all States. Two objections to it were suggested: first, that an allotment of periods by alphabetical order was really the creation of a court by chance; and second, that it deprived each nation of any hand or voice in the court for six years out of the nine for which it proposed to establish it; whereas the first scheme had given every nation a seat in the court by a permanent judge for a fixed period, besides the right to have a judge of its own appointment upon the court whenever it had a case before it for decision.

Another proposal has been that seventeen nations, including the eight first mentioned and nine others which together should represent all parts of the world, all languages, systems of law, races, and human interests, [685] should be selected by the Conference, with a power to each to appoint a judge for the whole term of the court, thus recognizing the principle of equality of sovereignty to be exercised in the power of creating the court and selecting the judges.

Another proposal has been that four judges should be assigned to America, as a unit, trusting to that cordial and friendly relation which exists at the present time, and it is hoped will always exist, between the United States and all the other nations of Central and South America, and which has been successfully fostered and maintained by several Pan American conferences, to enable them to make a distribution among themselves of the four judges so assigned, in a manner that should be satisfactory to all.

This plan would have relieved the problem of all questions raised in regard to America, and would have left it for the other nations to make a similar distribution of the thirteen judges among themselves, which it was hoped might be done by means of the peaceful and friendly relations now existing between all the nations of both continents.

The practicability of this scheme, as of all the others, is still open for the consideration of the committee.

The suggestion has also been made, that for the purpose of the partition of the judges of the court the nations should be classified upon the sole element of comparative population; but it has been found, upon examination, that there were so many other essential factors that ought, upon every principle of justice and common sense, to enter into the distribution of judges that no definite project for such a distribution has been proposed.

The statements already made demonstrate the extreme delicacy and difficulty of the problem presented to the Conference in the formation of the permanent court, but I confidently believe that it is entirely within the power of the committee, on a frank and candid exchange of views, and with the disposition that possesses it, to make such mutual concessions as may be necessary to solve the problem.

It has been suggested that it would be better to put any of the plans proposed to the vote, so as to draw the line of distinction clearly between its advocates and its opponents; but, as all are believed to be in favor of the permanent court, the expediency of such a proposition is doubtful, for such a vote would not in any way indicate what nations were in favor of a permanent court and which of them were opposed. And to have the project of a court voted down because linked with a scheme for the distribution of judges that was unacceptable to a majority, would convey to the world a wrong impression—that the Conference was not in favor of the creation of such a court.

It has also been suggested that the difficulty should be regarded as insuperable in the present Conference, and avoided, or rather evaded, by securing a unanimous vote for the establishment of the court upon the constitution now under consideration, and leaving it to the Powers or to the next conference to establish, if possible, a mode of selecting the judges that should be satisfactory to all the Powers.

As I have already said, the adoption of this plan would be perhaps an advance upon anything that has heretofore been accomplished. But it would be surely a serious failure, and should not be resorted to with any false illusions, as it might practically result in the burial of the project for the Permanent Court altogether.

We must solve the problem—either permanently or provisionally. This is a solemn duty that rests upon us, and it would be ignominious in the last degree for us to confess our inability to discharge it; and we therefore have to
[686] consider a wholly different method from any of those heretofore suggested, namely, a free election by the whole Conference, voting by States, each exercising sovereign power on an absolute equality, and accepting the result of such an election, as electors or elected, as such an exercise of the elective power might result.

There is nothing to prevent the Conference voting freely and without any restraints whatever for a definite number of nations,—seven or nine or eleven, thirteen or seventeen,—who should each be authorized to appoint a judge for the full term of the court. This would concede all that is claimed in the way not only of equal sovereignty but of equality in all other respects, and each nation would take its chance of a successful canvass, and I have no doubt it would result in the successful establishment of an excellent court to which all nations could resort or refrain from resorting in each case that should arise, as they should see fit.

Another plan worthy of consideration, and which, I think, might successfully solve the problem, is to resort to an election—in which all the States should have an equal voice—of individuals, jurists, or statesmen of distinction, to constitute the court. If this method is resorted to, it might be in connection with the plan for establishing the court and its constitution, and leaving the method of final and permanent selection of judges to the nations or to the next Conference.

For it might and perhaps ought to be resorted to as a temporary and provisional plan to secure the organization of the court as soon as it should be ratified by a sufficient number of Powers constituting a majority.

The plan would be for an election, each State casting one vote, for a prescribed number of judges, which should be deemed suitable for the temporary and provisional organization of the court, to hold office either until the next conference or for a specified number of years, or until the Powers, by a diplomatic interchange of views, should adopt some different method as a permanency.

There is ample material within the Conference itself and within the existing court, in the constitution of which all the Powers have had an equal hand, for the creation and installation of such a tribunal provisionally. The selection might be limited to the members of the existing court, or extended to other jurists whose names are familiar to all, every one of them of the highest character and of world-wide reputation, and any quorum of whom, sitting as a court, would command the confidence and admiration of the entire world, and be relied upon to do justice in any case that might arise. For one, speaking for the United States of America, I should be perfectly willing to intrust the fortunes of the court, and the success of this Conference in creating it, to the result of any election that might be made as suggested, and I hope that it will be taken into serious consideration and recommended for action by the committee, in the event of no plan being proposed that can command more general approval.

A further method of election, under further limitations, has been proposed and is also worthy of consideration, and that is, that the nations should nominate each a number of jurists, selected from the old court or at large, to consti-
[687] tute the new court, whether provisionally or permanently; that these nominations should be received by an executive committee of three, to be appointed by the president of the Conference; and that the names of all candidates nominated by five or more Powers should be placed upon a ballot and offered for the final choice of the Conference, voting by States; and that those receiving the largest number of votes on such final ballot, to the requisite number prescribed for the court, should be declared the elected judges.

I am not without hope that still other plans will be evolved from the discussion of this intricate and important matter which is now to take place that may command the approval of the committee and secure the establishment of the court.

So sure am I that the establishment and organization of the court will be a great triumph of civilization and justice, and an effectual guarantee of the peace of the world, that I would urge, with all the earnestness of which I am capable, the adoption even of one of the provisional schemes referred to, if no permanent method for the choice of judges can be now agreed upon. And I trust that, laying aside all prejudices and national differences, all pride of opinion and all desire to secure special advantages for our respective nations, we shall devote ourselves, with one mind and one heart, to the solution of the problem that is now before us. (*Applause.*)

His Excellency Mr. **Ruy Barbosa** takes the floor and speaks as follows:

The great argument, Mr. President, and the only argument in fact that has until now been made against the Brazilian proposition is that in the system of this proposition the great nations, the States with great areas and populations,

great in wealth and advanced in culture, would place themselves into the possible position of being judged before a court in which their representatives would have the same vote as those of the small States of the world.

To make palpable the offense against the rights of the great nations in this imaginary equalization, we take one of the States with the least territorial area, with the least number of inhabitants, least in wealth; a designation is given to it, a name given to it and then the question is asked if it is not inconceivable that, in the organization of international justice, their arbitrators might exercise the judicial function upon the same plan as the rest, to condemn countries like France, Great Britain, Germany or the United States.

The argument, if it were true, might become a double-edged weapon against our antagonists, by making impossible the creation through which the authors of the American project dream of realizing perfection of international arbitration. For if the great States do not trust the impartiality of the small, the small on their part might set forth reasons for their not trusting the impartiality of the great.

But the argument is inexact in itself. It sins materially against truth. It cannot in good faith be brought up against the Brazilian proposition save by those who have not read it.

Although, at first sight, this affirmation may seem strange, that which is, nevertheless, certain is the fact that the objection with which we are dealing would be more applicable to the American than to our proposition. For if the judges appointed by some of the less important States of America, of Europe and of Asia do not inspire the great European Powers and the United States with confidence, their system of voting assures, nevertheless, periodically to these judges the right to judge.

This authority of the judges of the small States against whose moral aptitude the distrust of the powerful States pronounces itself is, therefore, rendered obligatory and inevitable. In spite of this distrust, they will always have [688] to submit to the votes of these judges whose judicial capacity they put in doubt; for in the rotation system, representatives of the small States will follow each other in turn in the court.

But in the system of the Brazilian project there is nothing of this kind. The judges appointed by the small States, even as those appointed by the great States, have the right to sit permanently in the court; but they will exercise the function of judges of States, great or small, that freely choose them.

This the Brazilian proposition peremptorily establishes in its Article 6 which reads:

> The parties in dispute are free either to submit their controversy to the full court or to choose from the court, to settle their difference, the number of judges that they agree upon.

In consequence, in the system of the Brazilian proposition the Powers will never run the risk of being subjected, in spite of themselves, to judges appointed by the small States, or to any judge whatever in whom they may not have the most absolute confidence. It is the Powers themselves that will choose at their own pleasure, from the membership of the court, all their judges, by composing for the settlement of each case a tribunal of three, five, seven members, entirely

at the convenience of the parties. And, formulated in this manner, our project not only obeys the essential principle of arbitration, but is in addition animated by the true interests of justice which stands to gain nothing in the decision of disputes by tribunals of large membership.

Therefore, it is by misjudging the Brazilian proposition that, in certain newspapers, public opinion has been misled by this argument which is palpably inexact.

Furthermore, this explanation is made especially for publicity, to whose agencies I feel it my duty to communicate it, without contravening, it seems to me, the imaginary secrecy of the Conference.

In order to reach an agreement with regard to a basis for the discussions relative to the matter of the composition of the court, the President invites their Excellencies Messrs. NELIDOW, Count TORNIELLI, CHOATE, Baron MARSCHALL, BARBOSA and MÉREY to constitute themselves, along with himself, into a preparatory subcommittee. (*Approval.*)

The meeting closes at 12:30 o'clock.

[The annex to this meeting (pages 689-693 of the *Actes et documents*), being an English text of the speech of Mr. CHOATE which appears *ante*, pages 683-687, is omitted from this print.]

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EIGHTH MEETING

SEPTEMBER 18, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4: 15 o'clock.

The minutes of the seventh meeting are adopted.

From the address of his Excellency Mr. CHOATE delivered in the last meeting, his Excellency Mr. **Beldiman** quotes the following words:

> We have decided with practical unanimity that there shall be such a court.

He desires to state that his country has not contributed toward this unanimity and that it reserves entirely its opinion.

His Excellency Baron **Guillaume**, his Excellency Mr. **Gonzalo A. Esteva**, Mr. **Georgios Streit** and his Excellency Mr. **Ruy Barbosa** make similar reservations.

His Excellency Mr. **Ruy Barbosa** remarks that his delegation has never considered the creation of a second court as necessary, and it is only in the spirit of a compromise that the Brazilian proposition has been submitted.

His Excellency Mr. **Nelidow** gives an account of the discussions of the preparatory subcommittee constituted in the last meeting by eight first delegates [1] for the purpose of coming to an understanding regarding the manner of composing the court.

The Anglo-Germano-American project has not been supported and the rotation system has been defeated.

In the next place, the committee examined a system of election according to which the members of the Court of 1899 should choose from among themselves fifteen to seventeen judges to constitute the new tribunal.

This manner of composing the court has likewise met with opposition. It was objected that all the members of the Court of 1899 were not jurists and could not offer sufficient guarantees.

The subcommittee then attempted to combine the two principals of nomination and of election. Each Government should nominate four candidates; the list thus established would be submitted to the members of
[695] the present court who would choose therefrom. This combination was likewise put aside for the reason that it was found too complicated, and it was thought that the States should be left free to designate, in fact, the members of the new court.

[1] This subcommittee was composed as follows: their Excellencies Messrs. NELIDOW, LÉON BOURGEOIS, CHOATE, Baron MARSCHALL VON BIEBERSTEIN, RUY BARBOSA, MÉREY VON KAPOS-MÉRE, Count TORNIELLI, Sir EDWARD FRY.

In view of the impossibility of reaching an agreement the subcommittee has decided to refer the matter to the committee of examination B.

His Excellency Mr. **Ruy Barbosa** desires to read before the committee the address which he made before the subcommittee:

Amid the vicissitudes of the question under discussion concerning the organization of a new international arbitration court, we have always maintained:

1. That this institution is not necessary, for the existing court, if improved, will meet all the needs of arbitration.

2. That if it be desired to create it in spite of all, it would have to be based upon the principle of the equality of the States, strictly observed.

3. That, in order to realize this principle in an entirely satisfactory manner, the only possible solution would be that of the direct and equal participation of all the States in the court by ensuring to each the designation of a judge therein, in accordance with the plan adopted in the Brazilian proposition which we have submitted to committee B of the First Commission, on August 20, last.[1]

It is possible to choose only between this system and that of election, the only other one imaginable, in order to take into account the equality of the States.

Animated by a spirit of conciliation which it never forsakes, and meeting the request that has come to us from the subcommittee, the Brazilian Government thought at one time that it might accept a compromise by accepting this second plan in order to succeed in constituting the projected court, in view of the fact that the error concerning the inequality of the States, committed in the proposition which has now been discarded, had been definitely renounced.

It is under this impression and in this sense that, in accordance with my instructions, I acquiesced on Monday in the suggestion made by the honorable Mr. Bourgeois, to allow the new court to be chosen by the present court, by establishing the equality of the Powers by means of the equality of the votes, and by providing that, in the selection, professional capacity should be taken into account apart from any consideration of nationality.

But in this very declaration I insisted that the Brazilian proposition was the only satisfactory one, and once more I attempted to demonstrate to you the inconveniences of the election.

In our meetings on Monday and Tuesday our discussions set into relief all these disadvantages and clearly set forth the distrust which it arouses in nearly all minds.

Aroused again by this doubtful solution, the distinctions of nationality were brought out once more in the form either of a division of the judges among Europe, America and Asia, or of the direct nomination of the members of the court by the Governments or of the imposition of the maximum number of one judge for each nation at the choice of the electors.

These doubts, these fears and these objections have, in my country, manifested themselves in public opinion; and my Government believes that it may not rely upon this opinion for a compromise upon the proposed basis, the more so because in its own mind, as well as in the mind of the competent men of Brazil, considerations of a higher order have convinced it that the equality of the States through any means whatever apart from the system of the real participa-

[1] Annex 83.

tion of all the nations in the court, each with its own representative, can never be realized.

More and more we palpably realize the impossibilities of the other system.

[696] In the first place, it seems to us an ever-present and fundamental principle in this matter that the appointment of judges for an international arbitration court constitutes and always has constituted a discretionary act, a non-transferable act of the sovereign Power.

In the second place, there is another principle involved in this question: the principle of the character of arbitration.

We have always maintained, with a persistency of which our minutes testify, that for the parties in dispute, the right to choose their judges is of the very essence of arbitration. We have declared this in the Brazilian proposition.

Furthermore, this right fulfills a rôle of the highest importance in the machinery of arbitration: to conciliate the existence of a court of forty-five members, imposed by the principle of the juridical equality of sovereign States, with the necessity, essential to strict justice, to have each case decided by a small number of judges. This is something we must never lose sight of in our appreciation of the two systems.

But in all the combinations that have hitherto been imagined for the solution of the problem, you are deliberately disregarding this right. And in doing so it is arbitration itself that you are tossing overboard. You replace arbitration, which implies choice of the arbitrators by the sovereign parties in their recourse to justice, by a jurisdiction which signifies obedience of subjects to a necessary authority. This departure, which removes international justice from its unalterable arbitral nature is, in our judgment, incompatible with the notion of sovereignty in international law. The Conference has not been requested to operate this revolution in international law. It would not dare to do so, even though the mandate to that effect were given to it. But it has not received such a mandate, not only because its program is simply directed to "*improvements* to be made in *arbitration*," but also because no one has ever foreseen this denaturation which it is sought to operate in the substance, while at the same time maintaining the name.

It would be absolutely impossible for us to make light of juridical principles of such a high order as these.

Moreover, there is in an election a defect which is fatal to confidence, which is the very basis of arbitration. An international election deprives nationals of the choice of capable men in order to entrust the mandate to foreigners. This impropriety is not an indifferent matter. If a French judge is a guarantee for France, it is France herself who must choose him in order that she may be sure of the excellence of the election and of the competence of the person elected.

Election from among the subjects of one and the same State is the best means of selection; for the reason that it is the members of the same family who know each other best. An international election, of all methods of selection, is the most unreliable, for being entrusted to strangers, it is carried out precisely by those who are least acquainted with the eligible persons.

These three objections of which the first two are objections of principle, seem to us to do justice to the system which proposes to organize the new international court on the basis of equality of the States by means of an election, and

refuses to the parties involved in the arbitration the right to choose their arbitrators.

Therefore, there is only left the other system, the system of the Brazilian proposition in order to loyally carry out the juridical standard of the equality of the States in the composition of the arbitral court, by maintaining, along with this right, that of the appointment of the judges, in each dispute, by the parties.

It is insistently asserted that if the system of one judge per State in the formation of the court is held to, it will become impossible to establish this tribunal.

But this is not true. We have repeatedly proved the contrary. But, even in supposing that it were so, it would not behoove us who do not
[697] believe that the innovation would be at all advantageous, to sacrifice our convictions.

Even in case such a court should appear to us to be necessary, we could not, in order to secure it, concur in any proposition whatever which would not meet these two important points:

1. The right, for each signatory Power, to appoint a judge to the court;
2. The right, for the Powers in dispute, to choose their judges in this court.

And in consequence, it would be impossible for us to surrender these two essential rules in favor of an institution whose necessity we do not acknowledge.

Therefore, as long as we are told that the only solution to which our juridical and political convictions are not opposed, is inadmissible, the Brazilian Government believes that it will be unable to cooperate in this work.

It has resolved to abstain from such cooperation.

Animated by the most conciliating dispositions, if the majority were decisively inclined that way, it does not desire to be an obstacle to an experiment, whose importance seems so beneficent to so many of our eminent colleagues.

The Brazilian Government will not manifest any hostility towards it, provided that the principle of the equality of the States is admitted, and provided also that there shall no longer be any thought either of the classification of the Powers into categories of sovereignties or of the machinery of rotation.

We shall confine ourselves, therefore, to an exposition of the reasons for our dissentient attitude by casting our contrary vote based upon these reasons, by abstaining from taking part in the court, as well as in the Convention relating thereto, and, finally, by placing our hope in the future.

It is to be believed that in making the evils of the coexistence of the two courts of international arbitration palpable, experience will redirect your judgment to the simplicity and to the sincerity of the system contained in the Brazilian proposition as the only one capable of harmonizing the rights of sovereignty with the exigencies of justice in the creation of a world court.

The **President** has special record entered of the declaration of his Excellency Mr. Ruy Barbosa. On the other hand, he states that no final proposition had been presented as yet for which he would assume responsibility. He has merely sought to discover a basis of agreement for the various propositions presented.

His Excellency Sir **Edward Fry** feels compelled to state that it has been impossible to agree upon a good method for the composition of the court. The numerous projects which have been studied, including those of their Excellencies

Messrs. CHOATE and RUY BARBOSA, do not seem to him to offer an acceptable solution.

His Excellency Sir EDWARD FRY proposes, therefore, the adoption of the following resolution:

> The Conference believes it desirable for the signatory Powers to adopt the project for the establishment of a court of arbitral justice by omitting the provisions bearing upon the appointment of the judges and upon the rotation to be established among them.[1]

His Excellency Mr. **Choate** makes an address in English, which is summarized as usual by Baron D'ESTOURNELLES DE CONSTANT:

I do not think that the time has come to give ourselves up to despair. We must do something to realize the hopes of the civilized world.

It follows from the speech of Mr. BARBOSA that he objects to accepting any other plan than his own. That is another form of despair. But in any
[698] case, as the PRESIDENT has very clearly shown, the investigating committee has not yet decided the question.

Many plans have been presented to this committee, but they have not been sufficiently studied and discussed.

I persist in thinking that the *plan of rotation* would be the most ingenious and the most just. However, in face of the opposition of certain Powers, we have given it up.

The only method which, under the present conditions, offers any chance of success is therefore that of the *election* of a court, whether it be a permanent or a provisional one.

The objections made to this method of composition of the court are purely imaginary. It is the laying down of distrust as a principle,—the distrust of the wisdom and of the loyalty of the electors.

One fears the coalitions of small Powers against the great. I declare that I do not share these apprehensions.

The representatives of the small nations are as qualified to be electors as the others, and they will agree to choose the best judges, independently of nationality. And assuredly, worthy judges can be found among the subjects of these same small nations. If we have not confidence in each other, why do we strive, then, to conclude a convention? Why do we not adopt a method which admits the principle of the equality of nations?

For myself, personally, I would run the risk of an election, whether it be made by the Governments, or by the Permanent Court, or by this very Conference, provided that all nationalities, all languages and all systems of law be represented. It matters little to me whether my nation may have a judge or not. We are not here for the sole advantage of our own country, but for the benefit of the community of nations.

The plan of Mr. MARTENS, which has been submitted to us, is excellent as a whole. He proposes that each country designate an elector, taken from the list of the members of the Permanent Court, and that these forty-five electors should, in their turn, choose fifteen judges, who should form the court.

Nevertheless, in this plan a certain number of judges is ascribed to Europe, to America, and to Asia, and that is its vulnerable point, for that recalls to mind

[1] See annex 87

the old plan of rotation. On the other hand, it does not appear indispensable to assemble again all the electors at The Hague, for practically the vote would be issued by the Governments. One could therefore dispense with the formality of the reunion and have the electors vote through the medium of the Bureau.

I take the liberty in this class of ideas to make a proposition to the committee which seems to me to answer all of the objections.

Proposition with Regard to the Composition of the Court of Arbitral Justice

ARTICLE 1

Every signatory power shall have the privilege of appointing a judge and an assistant qualified for and disposed to accept such positions and to transmit the names to the international bureau.

ARTICLE 2

The bureau, thereupon, shall make a list of all the proposed judges and assistants, with indication of the nations proposing them, and shall transmit it to all the signatory Powers.

ARTICLE 3

Each signatory Power shall signify to the bureau which one of the judges and assistants thus named it chooses, each nation voting for fifteen judges and fifteen assistants at the same time.

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ARTICLE 4

The bureau, on receiving the list thus voted for, shall make out a list of the names of the fifteen judges and of the fifteen assistants having received the greatest number of votes.

ARTICLE 5

In the case of an equality of votes affecting the selection of the fifteen judges and the fifteen assistants, the choice between them shall be by a drawing by lot made by the bureau.

ARTICLE 6

In case of vacancy arising in a position of judge or of assistant, the vacancy shall be filled by the nation to which the judge or assistant belonged.

This plan is so simple that there is no need of long discussions. If fifteen nations only accept it, it could become the point of departure of a general agreement. The example of 1899 is there to prove that the adhesions could come afterwards.

The immediate adhesion of any particular nation, great or small, would not be indispensable. This would be an experiment, and the nations who would not accept it to-day would be able to come to a decision later on.

I think that my proposition, if it is adopted, will give us good judges and will satisfy all the world.

It is a matter of indifference to me whether the election takes place here or elsewhere, whether the court be permanent or provisional, constituted for five, for three, for two years, provided that we may not return to our countries with empty hands. It is better to do something than to do nothing. I do not yet share the despair of Sir EDWARD FRY. As long as the Conference lives there is cause for hope.

His Excellency Mr. **Ruy Barbosa**: I shall say but a few words, Mr. President. But I must say them, nevertheless, for I have to reply to two points of the address just delivered by our eminent colleague, the American Ambassador.

The Honorable Mr. Choate has made an allusion which is in no way justified by my attitude with regard to the matter under discussion. According to his Excellency, who regrets my attitude, I am resolved to consider no other proposition except the Brazilian, the one of which I am the author and which I have advocated. But my attitude is not such as our venerable colleague has attempted to make it appear. I have been so unfortunate as not to have been able to make myself intelligible to him, whose mind is otherwise so keen.

I do not attach an absolute importance to the Brazilian proposition. That has never been my intention. The proof of it is found in the fact that in the meeting of August 20 I submitted it under the title:

> Provisional suggestions for use in the discussion of the composition of a permanent court.

What I consider of importance in that proposition relates to the main principles contained in it and which have inspired it.

In that proposition we find three essential ideas. In the first place the idea which constitutes its foundation, in other words, the substance: the principle of the equality of the States. In the second place there is this second idea which we regard as the only means of making the realization of that principle possible: the right for each State to appoint a member to the court. In the third place there is the rule which in our judgment is inseparable from arbitration and which assures to the States in dispute the right to choose their judges from the membership of any arbitral court. Upon these three matters we find it impossible to compromise; and it is because you do not desire to recognize these three ideas as undeniable in the other propositions discussed in the subcommittee, that we resolved, in the last meeting, not to continue to take part in its labors. In our judgment, the Brazilian proposition is a secondary matter. Submit to us another one in which the problem meets with a like solution, although in a different form, that is to say, in which each nation shall have a judge in
[700] the court, and the parties in each dispute the right to appoint those who shall settle that dispute, and we shall gladly give our support to such a proposition.

Without the fulfillment of these conditions we are not free to support any proposition. And this is the reason why we could not give our support to the combination that has just been proposed by the Honorable Sir Edward Fry.

According to the idea suggested by our honorable colleague, the Conference would advise the Governments to organize the new permanent court in accordance with the plan outlined in the project adopted by us in this committee, as soon as they shall reach an agreement as to the manner of constituting it.

But this seems to us even more unacceptable than the other arrangements as to which we have not reached a favorable vote in the subcommittee. This seems to us absolutely indefensible.

What is this project we are asked to recommend for adoption by the States? We have been dealing with a hypothetical discussion, both in the first and in the second reading, always upon the condition that we should first discover the unknown quantity of the problem, that is to say, a system for the composition of the court. But this system, this unknown quantity we have not succeeded

in discovering. What is the consequence? The project has failed; it no longer exists when it lacks the vital condition of its existence.

What is it that took place at each reading of this project? The project contains thirty-eight articles. Those dealing with the composition of the court are found among the first. They are Articles 6 and 7. The entire project was discussed up to Article 6, and when 6 was reached, then, to our objection that it was necessary to settle forthwith the difficulty concerning the composition of the court before pursuing the examination of the subsequent articles, the advocates of the project answered that this point would be reserved, that by continuing the discussion we assumed no responsibility, because the final adoption of the project would naturally demand the adoption of a means for the composition of the court, and that if no agreement were reached for this means before the final vote, then all we had discussed would be regarded as not having taken place.

Well now, we have come to no agreement regarding the means of the composition of the court. How then could we take part of the project and regard it as standing all by itself, and as such recommend it for adoption by the Governments.

I can think of nothing more absurd nor more contrary to that kind of mutual engagement upon the faith of which we here consented to pass on beyond Article 7 of the project before taking up the discussion regarding the manner of composing the court which the Anglo-Germano-American proposition provided for and attempted to solve in that and in the preceding article.

The authors of the project had correctly understood that the law to govern an institution cannot be established before the institution itself is created; and so they commenced to establish the court by defining the system of its composition. It was after having done this that they regulated, in the thirty articles following, the prerogatives and the obligations of its members, as well as the competence and procedure of the court.

Now, as to the matter of these two reserved articles, we did not get farther than the confession of the impossibility on the part of the Conference of solving the question contained in it, that is to say, the question to whose solution, it had been declared, all the rest should be subordinated. And yet this Conference would have considered itself justified in recommending to the States the adoption of this same project after having recognized and acknowledged its impotence for laying the bases for it.

That is what we find indicated in the proposition of the Honorable Sir Edward Fry. Can it be possible? Is it not a fact that in the plan of the
[701] Anglo-Germano-American proposition the system of competence and procedure presupposes the system for the composition of the court adopted? Is it thought possible to find a machinery of jurisdiction and procedure that can be indifferently adapted to any court, independently of the type of its composition? Did not the collaborators of the project begin by settling the matter of the composition of the court? Is it not a fact that after they had settled that matter they believed themselves in a position to outline the operation of the procedure? How then could it be admitted that a procedure and a manner of operation imagined for a court constituted in this way should adapt itself to another type of constitution which in the future may be given the preference through a convention between the different States?

This, gentlemen, I cannot understand.

But we have been told that at all events we must issue from here with a new permanent court, because, without such a result, we would have disappointed the hopes of the world. Is this consideration a just one?

No, gentlemen.

I know quite well that lately an attempt has been made to throw such an atmosphere around our discussions. For some time now we have been deliberating, under the pressure of the idea that the new court must be realized in order not to fail to accomplish that which public opinion expects of the Conference. Now is this preoccupation just? Can public opinion hope for the creation of a second arbitral court from the Conference? Not at all. Public opinion would have no right to depend upon us except for what we have obligated ourselves to give to it. And what is it we have obligated ourselves to give? Evidently that which is included in our program. The program of the Conference is its own *compromis* toward the public.

But what does the program of the Conference state as regards this matter? I have here before me that program, just as it was defined by the terms of our convocation. What does this text, which I have before my eyes, say in this matter?

Here it is, formally stated:

> *Improvements* to be made in the provisions of the Convention relative to the pacific settlement of international disputes as regards the *Court of Arbitration* and the international commissions of inquiry.

So here we have the very words of the program, their authentic tenor. And what do they mean?

Simply that we must "make *improvements in the Court of Arbitration.*"

Therefore, the program not merely does not impose upon us the duty of organizing a new arbitration court, but it limits our powers to the improvement *of the Court,* that is to say, the existing court. The singular form of this word as here used accurately denotes a single court, and admits only of improvements to be made in it.

Where, where can we find in this text anything that expresses an obligation to create another court? In attempting to do so, we are going beyond the scope of the program. We would even be acting against that program; for we would have established two courts, where the program denotes only one; we would have made free to establish a new court when in fact the program permits us of correcting merely the defects of the court that now exists.

In objecting, therefore, to this unknown innovation, an innovation which is contrary to our program, we confine ourselves to the limits of our program, we fulfill our duty, and public opinion cannot but approve of our action. Public opinion would be wrong if it required of us a work beyond that outlined in the program which defines our competence. This might be accomplished through the absolute will of sovereign States; but it is not included in the task assigned to the Conference. The Conference could, therefore, not be reproached for abstaining from that course.

[702] His Excellency Mr. **Nelidow** has listened with interest to the discourse of Mr. Barbosa, and he associates himself with the speaker in the last idea which he has expressed: the Conference may disband without having instituted

the Court of Arbitral Justice and without incurring, for that reason, the reproach of having disappointed the hopes reposed in it, for the reason that the question was not included in the program.

On the other hand, it is well to remark that if this program did not foresee expressly the institution of the Court, it did not either exclude it, for it refers to the improvements to be made in the Convention of 1899.

It may, therefore, be asked whether the committee has found a means to improve the Court of 1899. His Excellency Mr. NELIDOW does not believe that it has. He cannot associate himself with the proposition of Mr. CHOATE to accomplish *something*. We must do *something good,* or nothing at all.

If it were possible to work out a combination which might conciliate all the exigencies, his Excellency Mr. NELIDOW would be happy to welcome it. But for the moment he can but state that in spite of all the efforts made, no such result has been reached, and under these conditions his present preferences would rather incline to the new proposition of Sir EDWARD FRY. The task of coming to an understanding with regard to the composition of the court would be reserved to the Governments or to the next Conference.

His Excellency Mr. **Asser** recalls that at the opening of this Conference he had stated that the Government of the Netherlands desired to propose the creation of a small committee to be commissioned to settle the *compromis* in case of disagreement between the parties, or to choose, if necessary, the umpire; and if events should so demand, even to act as a tribunal. Because of the submission of the Anglo-Germano-American project, Mr. ASSER had not formally presented a proposition. He now declares that he reserves his right to deposit such a proposition.

The **President** observes that the committee is now confronted with the propositions of their Excellencies Messrs. CHOATE and Sir EDWARD FRY. He asks if Mr. RUY BARBOSA maintains his.

His Excellency Mr. **Ruy Barbosa:** The essential purpose of the Brazilian proposition was to give practical form to the principle of the equality of the States, to define it in concrete form, against the principle of the classification of sovereignties through the machinery of rotation, adopted in the Anglo-Germano-American proposition.

Our principle, that of the juridical equality of the largest and the smallest States, this principle, which in the beginning was even scoffed at and which has attracted to us many epigrams and epithets, is now the victor.

On the other hand, the system of the Brazilian proposition, in ensuring to each State the right of being present in the court by means of the rule of one representative given to each nation and chosen by that nation, excludes the system of international election, suggested in the various solutions which the subcommittee has examined one after another without any result. The method of election which is a common feature of all these projects must, therefore, be likewise regarded as having been discarded.

Thus, from the moment when our proposition prevailed in its two fundamental ideas, which constituted its purpose, and also from the moment when we did not present it with the intention of creating the new court of which we neither recognize the necessity nor the utility, but merely with the intention of opposing the institution of this court in accordance with the principles contrary

to our own, we have no interest whatever that our proposition should be discussed and put to a vote.

It has succeeded in attaining all that which it contemplated. We prefer to content ourselves with that result. Thus its success is more complete
[703] than if the Conference should deign to approve it, for in such case, the result would be the establishment of the second court, something which we do not believe is desirable.

We do not wish for two courts. Only in case a second court had been created, would we desire to make it impossible to organize it contrary to the essential principles of the law of nations.

The **President,** therefore, states that there are only two propositions before the committee. It seems to him that the American proposition must be voted upon first; the English proposition constitutes an adjournment and can be taken up only after it shall have been made clear that the committee is decidedly unable to come to any agreement.

Very interesting remarks have been exchanged concerning the disappointment which a negative result of our labors might have upon public opinion. This is a phase of the matter which I shall not discuss for the present; I desire merely to concern myself with the responsibility of the committee before the Commission which has requested it to draft a project and to submit to it exact votes.

His Excellency Mr. **Choate** asks each member of the committee to draw his attention to any point whatever of his project which might be contrary to the principle of the equality or which would fail of being susceptible of correction.

His Excellency Mr. **Nelidow** calls for explanations regarding Articles 1 and 3 of the project [1] of his Excellency Mr. CHOATE. Must the judges and the deputy judges appointed by each signatory Power belong to the same nationality?

His Excellency Mr. **Choate** declares that according to his project, the Powers are in no way obliged to concern themselves with the nationality of the judges. Article 1 refers to the right of appointing the judges from the list, with full freedom.

His Excellency Mr. **Nelidow** recalls, however, that the proposition of his Excellency Mr. CHOATE had been discarded by the subcommittee as in the nature of a return to the principle of nationalities.

Mr. **James Brown Scott** formally declares that Article 1 gives to each nation the right of proposing two persons, from no matter what country, as judge and as deputy judge, and that these two persons may be of different nationality.

Therefore, we have here the principle of complete freedom. The United States is ready to accept the result of any election whatsoever, even though the American candidates were all eliminated.

His Excellency Mr. **Choate** is willing to sacrifice all purely American preferences and interests in the interest of justice and humanity.

His Excellency Mr. **Asser** remarks that if in virtue of Article 1 of the project of his Excellency Mr. CHOATE, the forty-five States are absolutely free in their choice, such choice may possibly go to the same persons and to a number inferior to fifteen, for instance, twelve only.

Mr. **James Brown Scott** replies that that will be an excellent way of re-

[1] Annex 86.

ducing the tribunal to the modest proportions suggested by Mr. ASSER himself.

The **President**: That would be ideal. The twelve judges to whom Mr. ASSER refers would thus be designated unanimously by the entire civilized world.

His Excellency Mr. **Martens** believes that the discussion which has just taken place shows that the draft of the project of his Excellency Mr. CHOATE is not sufficiently clear. He proposes, therefore, to postpone voting upon it.

[704] Upon a question of his Excellency Mr. **Nelidow** whether, according to the system of Mr. CHOATE, the Power designating the English judge must also designate the English deputy judge, Mr. **James Brown Scott** replies that this is in no way so, and that the judge and the deputy judge chosen by a Power may belong to different nationalities.

The **President** observes that Mr. JAMES BROWN SCOTT has explained that the essential principle of the American proposition is the principle of election. It is upon this principle, *even as it is formulated in the said proposition,* that he believes it necessary to consult the committee of examination.

As for the details, Mr. CHOATE would accept any suggested improvements. It is possible even now to establish whether the principle of the project will secure a majority. Once the idea of the appointment of the judges by election is admitted, it would be easy to polish its phraseology. In consequence, the PRESIDENT puts to a vote the general principle of election in the form in which it is presented in the project of his Excellency Mr. CHOATE.

Voting for, 5: United States, France, Greece, the Netherlands, Peru.

Voting against, 9: Germany, Austria-Hungary, Belgium, Brazil, Great Britain, Italy, Portugal, Roumania, Russia.

His Excellency Mr. **Choate**: I can only regret this result and the more so because not a word had been said by those who have voted against the very equitable principle of the election, in order to explain their vote.

His Excellency Mr. **Ruy Barbosa** desires to state that he has already presented his remarks in regard to this matter in the declaration which he has had the honor to submit to the committee. He declared against the principle of election and gave his reasons therefor.

His Excellency Mr. **Mérey von Kapos-Mére** also states that if he has not this day submitted his reasons for the vote he just cast, it is because he has taken part in the discussions of the subcommittee of eight, and because at that time he made known his objections against the system of election.

His Excellency Sir **Edward Fry** has likewise explained his attitude before the subcommittee.

The **President** now presents the proposition of his Excellency Sir EDWARD FRY and reads it aloud:

> The Conference believes it desirable for the signatory Powers to adopt the project for the establishment of a court of arbitral justice by omitting the provisions bearing upon the appointment of the judges and upon the rotation to be established among them.[1]

His Excellency Mr. **Mérey von Kapos-Mére** offers two objections to this text. The first, which is purely of form, applies to the indication of the number of the annex of committee B: it might be suppressed and the project might be

[1] See annex 87.

referred to in a different way, for instance, by accompanying it with the words "*adopted by the Conference.*"

As to the second objection, it refers more particularly to the idea itself of the motion: the phraseology does not seem sufficiently clear. It states that it is "*desirable for the Powers to adopt the project.*" But the Conference can hardly be expected to recommend a project whose principal part is still lacking.
[705] It would, therefore, be necessary merely to express the desire that the Powers may adopt the project

as soon as they shall have agreed upon the conditions of appointing the judges.

His Excellency Baron **Marschall von Bieberstein** fully concurs in this view: In the present conditions of our labors, we are not at all in position to adopt this project, because it is incomplete. How then could we recommend its adoption to the Governments? We must confine ourselves to expressing the hope that a solution will be found.

His Excellency Mr. **Choate** insists upon the necessity of doing something and of finding something practical and useful in the work of committee B. As regards himself he regrets very much that his two collaborators should have voted against the principle of election. Furthermore, he reserves to himself the right to take before the Commission and, subsequently, before the plenary Conference, the matter of the election of the judges by the States. He still hopes that this principle will secure a majority. The creation of a permanent court has been decided upon almost unanimously. If, furthermore, an agreement might be reached concerning the principle of election, this would be a great step forward. In any case it is necessary, in his judgment, to wait until the principle of the election may have been defeated by the Commission before concurring in the proposition of his friend, Sir Edward Fry.

Mr. **James Brown Scott**: We have adopted the number of seventeen judges with the original rotation plan in order to give the right to sit in the court to the greatest possible number of Powers. At present, with the system of election, or with any other system, we would be willing to reduce this number to fifteen in order that there might be symmetry with the fifteen judges of the Prize Court.

His Excellency Mr. **Nelidow** proposes to modify the proposition of his Excellency Sir Edward Fry in the following way:

> The Conference recommends to the Governments to approve the project of a Court of Arbitral Justice, saving Articles 6, 7 and 8, and to put it into execution as soon as a system for the organization of the judges shall have been found.

It is quite just that this project which engages the finances of the signatory Powers should be subjected to a careful study by the Governments themselves. But we may present it by stating that in our judgment it will be ready for operation as soon as a system for the appointment of the judges shall have been accepted. In this manner, there will be something that may be at once put into force.

The **President** asks Mr. Louis Renault, as president of the drafting subcommittee, in what form all these wishes shall be inserted into the Final Act. Will only one resolution be inserted, or will the entire project be included?

Mr. **Louis Renault**: Through investigation some similar precedents might be met with. If it is desired to retain the project, it would be well, in the first place, to eliminate from it all that which pertains to the election of the judges. It is quite possible to make a convention that might be signed even now; this was done with regard to a convention dealing with successions, and signed at The Hague on July 17, 1905. The putting into force of this Convention was *subordinated* to a regulation of procedure which had not yet been settled. In the present case, we are trying to find a similar system.

His Excellency Mr. **Nelidow** concurs in the view expressed by Mr. Louis Renault. It would be an excellent way to introduce the project for a court of arbitral justice into the final act by *subordinating* its putting into force to the organization of the recruiting of the judges.

His Excellency Mr. **Mérey von Kapos-Mére** asks if the Convention concerning successions to which Mr. Louis Renault alluded has been ratified.

[706] Mr. **Louis Renault**: Not at all. Ratification would be of no use until after the regulation of procedure had been adopted.

His Excellency Baron **Marschall von Bieberstein** sees a great difference between the present case and that referred to by Mr. Louis Renault. We may indeed sign a convention which has no regulation of procedure—but we cannot create a court which has no judges.

The **President**: The system proposed by Mr. Louis Renault would have for its result to show that there is an agreement upon a large number of points. For all those who have collaborated in the project for a court of arbitral justice, either by cooperating in it directly, as our colleagues from Germany, from Great Britain, and from the United States, or by discussing and amending it, it would, in short, be proof that the entire Conference had done a fruitful work.

His Excellency Mr. **Mérey von Kapos-Mére**: In so far as proof to that end is concerned, it may be had in many ways. The project exists and will be regarded in one way or another in the acts of the Conference. But if it is inserted in the body of the general convention, it will frighten those who, in principle, are hostile to the court, and may prevent them from signing the whole matter. Furthermore, we shall give a false impression to the public: We will make the people believe we have created something when, in fact, we have come to no understanding.

His Excellency Mr. **Choate**, after having read the text of the motion of his Excellency Sir Edward Fry, finds that its lukewarmness is excessive. Its phraseology is very discouraging and sounds very timid. Instead of saying: "The Conference believes it desirable . . .", would it not be better frankly to say that which is the truth: "The Conference *adopts* the project . . ."? He proposes, therefore, that it should begin with this affirmation and then follow with this statement:

> Refers it to the signatory Powers in order that they may reach an agreement regarding the means of choosing the judges and of constituting the court: after which, the project shall immediately go into force.

His Excellency Mr. **Nelidow** concurs in the last sentence of the proposal of his Excellency Mr. Choate. He believes that it will admirably complete the project. The whole of the articles to be inserted in the Final Act might be

entitled: "Project for the constitution of a Court of Arbitral Justice." This project would then be regarded as having been *adopted* by the Conference. Later on an article might be added

> recommending this project to the Governments and putting it into force as soon as the organization of the court shall have been provided for.

The **President**: It is indeed interesting to show what the Conference has *worked out* and *adopted;* we cannot refuse to state and include in the Final Act that the Conference has adopted Articles 1 to 38 of the project and that a great majority has been secured for the principle of a court constituted according to this project.

His Excellency Mr. **Mérey von Kapos-Mére**: The adoption of Articles 1 to 38 has never been anything but hypothetical and always subordinated to the adoption of a system for the appointment of the judges.

The **President**: What I am now saying is not in conflict with what you have said. The Conference has adopted one thing: it depends upon the Governments to do another thing. But no engagement, that is to say no obligation, will be incurred until after the Governments shall have found a sufficient machinery. In fact, the adoption of Articles 1 to 38 will have its effect—as is desired by Mr. MÉREY—only on the day when the Governments shall have reached an understanding with regard to Articles 6, 7 and 8.

[707] His Excellency Mr. **Nelidow**: In short, we ask the Commission to adopt the whole of the project in order to enable us to *propose* to the Governments a text *adopted* by the Conference.

His Excellency Mr. **Mérey von Kapos-Mére**: If the committee of examination could have foreseen at the first reading that we could not secure a machinery for appointing the judges, not one article of the project would have been adopted.

The **President**: But if a machinery is found through governmental effort, then, retroactively, the whole project subordinated to this condition will have been adopted. It is wise and economical to adopt a project ripely studied with the condition of the understanding that is to be secured regarding a special point of this project.

Mr. **James Brown Scott**: Suppose that the committee had adopted a project with reservations. The opportunity presents itself now to adopt it definitively.

Mr. **Louis Renault**: But it does not matter; if there have been reservations in so far as the committee is concerned, there will be none for the Commission. It will know that it cannot depend upon the present organization of the court. If then in spite of that fact, it adopts Articles 1 to 38, it will have done so of its own motion. We will not be surprised and will know what to expect.

His Excellency Mr. **Mérey von Kapos-Mére** entirely shares this view of the matter. But the question is a quite different one: He wonders if the Commission will be able to adopt the whole project in view of the fact that it presents an essential gap.

Mr. **Louis Renault**: Somebody suggested that the principle of election should be once more submitted to the approval of the Commission: this will furnish a fresh opportunity to vote once more upon the whole project.

The **President** summarizes the remarks that have been exchanged and consults the committee with regard to the proposition suggesting the reduction of the number of judges from seventeen to fifteen.

It is adopted without opposition.

Mr. **Louis Renault**: If it is desirable to retain the text which has been read twice, it would be best to eliminate from it all matter regarding the composition of the court.

The **President**: That is a proposition I intended to present at the time of the final vote. It does not seem possible to adopt a project with the words: "Articles reserved." If they are not adopted, they must be removed from the project. That seems to be the only solution. Articles 6, 7 and 8 might, therefore, be replaced with the proposition of his Excellency Sir EDWARD FRY.

Mr. **James Brown Scott** gladly accepts this method.

Mr. **Louis Renault** states that it would be premature to fix the form to be given to the Convention. This devolves upon the Drafting Committee of the Final Act. For the moment we desire to know if the committee adopts the vital part of the Convention and if it confirms its previous votes.

The **President** puts to a vote the whole of the project for a court of arbitral justice, saving Articles 6, 7 and 8.

Voting for, 8: The Netherlands, Germany, Great Britain, United States, Italy, Portugal, Russia, France.

Voting against, 5: Greece, Peru, Brazil, Roumania, Belgium.

[708] *Abstaining,* 2: Austria-Hungary, Luxemburg.

The whole of the project is adopted.

The **President** then puts to a vote the first part of the motion of his Excellency Sir EDWARD FRY[1] thus modified:

> The Conference recommends to the signatory Powers the adoption of the project it has voted for the creation of a Court of Arbitral Justice. . . .

Voting for, 8: The Netherlands, Germany, Great Britain, United States, Italy, Portugal, Russia, France.

Voting against, 5: Greece, Peru, Brazil, Roumania, Belgium.

Abstaining, 2: Austria-Hungary, Luxemburg.

The **President** reads aloud the second part of the motion of his Excellency Sir EDWARD FRY thus amended:

> . . . and putting it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.

Voting for, 8: The Netherlands, Germany, Great Britain, United States, Italy, Portugal, Russia, France.

Voting against, 5: Greece, Peru, Brazil, Roumania, Belgium.

Abstaining, 2: Austria-Hungary, Luxemburg.

The **President** reminds the members of the Commission that Mr. JAMES BROWN SCOTT has been designated as reporter and declares that he will convoke the First Commission as soon as the report of Mr. SCOTT is ready.

His Excellency Mr. **Beldiman** asks under what form the project of his Excellency Mr. CHOATE will be submitted for the approval of the Conference.

The **President** replies by saying that the Commission and the Drafting Committee will have to come to an agreement as to this matter.

[1] Annex 87.

He does not desire to close the sittings of committee B without an expression of thanks to all its members for the considerable amount of work which they have performed. If all the fruit that had been wished for could not as yet be gathered, it may, however, be said that the tree is blossoming and that the harvest will come. (*Applause.*)

Mr. **James Brown Scott** desires to state that from the beginning to the end, the three delegations from Germany, from the United States and from Great Britain have collaborated in the project which has just been adopted. Reference is often made to the *American* proposition: In fact, it is a common work and he desires to have his colleagues associated with him in it. (*Approval.*)

The meeting closes.

FIRST COMMISSION

FIRST SUBCOMMISSION

COMMITTEE OF EXAMINATION C

FIRST MEETING

AUGUST 16, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 3: 15 o'clock.

The **President** reminds the members that the committee of examination C bears a very technical character.[1] It has been established in order to study Articles 21 to 61 of the Convention of 1899 and has to concern itself mainly with questions of procedure.

It will, therefore, be necessary to refer to the other committees of examination A and B all of the propositions connected with Articles 20 to 61 of the Convention of 1899 for the pacific settlement of international disputes and more particularly those relating to the institution of a permanent arbitration court or to questions closely connected with the principle of obligatory arbitration.

The PRESIDENT then begins to read aloud Articles 21 and following of the convention.

ARTICLE 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

(*No observations.*)

ARTICLE 22

An International Bureau, established at The Hague, serves as registry for the Court. This Bureau is the channel for communications relative to the meetings of the Court. It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by a special tribunal.

[712] They undertake likewise to communicate to the Bureau the laws, regulations and documents eventually showing the execution of the awards given by the Court.

Mr. **Kriege** explains in a few words the German proposition[2] which demands the insertion of the words "*as soon as possible,*" after "*at The Hague*" in paragraph 4. It tends to satisfy one of the wishes expressed by the arbitrators in 1902, and its purpose is to avoid inconveniencing delays in the communication of the documents referred to in this article.

[1] As a result of successive designations made by the First Commission, committee of examination C has been definitely constituted as follows:

President: Mr. FUSINATO; *Reporter:* his Excellency Baron GUILLAUME; *Honorary President of the First Commission:* his Excellency Sir EDWARD FRY; *Vice President of the First Commission:* Mr. KRIEGE; *Members:* Mr. FROMAGEOT, Mr. LANGE, Mr. HEINRICH LAMMASCH, Mr. EYRE CROWE, his Excellency Mr. ALBERTO D'OLIVEIRA, Mr. JAMES BROWN SCOTT.

[2] Annex 12.

Mr. **Fromageot** states how regrettable it is that communication of arbitration treaties that are concluded is not regularly made to the Hague Permanent Bureau. This Bureau published with its last report a very remarkable synoptical table of various treaties, and this table would gain much by being completed.

As it is of the highest interest for all the Governments that the Hague Bureau be kept informed as soon as possible and in the fullest measure possible, Mr. FROMAGEOT proposes to insert in the fourth paragraph instead of the words "*as soon as possible,*" proposed by the German delegation, and an expression which does not lack a certain amount of elasticity, the word "*annually.*"

He suggests, furthermore, to the committee to authorize the Bureau to send periodically a circular letter to all the Powers to remind them of the obligation that they have contracted.

Mr. **Kriege** having remarked that it is hardly to be desired to give to the Bureau the right to remind the Powers of their duty, his Excellency Baron **Guillaume** proposes that the committee adopt the German amendment and to have consigned in the report the desire that the Powers should always conscientiously forward any communications that may be expected of them.

After an exchange of views in regard to this matter, the committee approves the German proposition.

The **President** states that the Russian proposition,[1] Articles 22 and 23, refers more to Article 31 of the Convention of 1899 than to Articles 22 or 23, and he proposes the postponement of their discussion until such time when the committee will bring up this article. (*Approval.*)

Article 23 is then taken up; it reads as follows:

ARTICLE 23

Within the three months following its ratification of the present Act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed.

[713] Upon the motion of Mr. KRIEGE, the **President** also postpones to a later day the discussion of the Russian proposition[2] included in the table opposite this article. The committee is indeed of opinion that it would be well to group under Article 37 of the Convention, all propositions relative to the incompatibility of the functions of members of the permanent court and the right to plead before it.

Article 23 gives rise to no remarks.

[1] Annex 10.
[2] *Ibid.*

ARTICLE 24

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by direct agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the arbitrators.

The tribunal of arbitration assembles on the date fixed by the parties.

The members of the Court, in the performance of their duties and out of their own country, enjoy diplomatic privileges and immunities.

The examination of the Russian Article 24[1] is referred to committee of examination B.

His Excellency Mr. **Alberto d'Oliveira** reminds the members of the committee that Article 24 has been criticized to the effect that it does not meet the case when two Powers charged with selecting the umpire do not reach an understanding. The article is evidently incomplete. Would it not be well to complete it?

The **President** states that drawing of lots might be resorted to as a means of conciliation; this solution of the problem has already been proposed by the German delegation in its Article 31 *b*[2] which refers to the *compromis* and deals with an identical situation.

Mr. **Heinrich Lammasch** thinks that this aleatory means of solving the difficulty might be necessary in cases requiring quick solution, but that in this contingency it is very dangerous.

Supposing that the two Powers indicated should not agree, they would each in such case name a friendly Power which in turn would each suggest a candidate of the court with whose favorable inclination to the mandatory Power they are acquainted. Lot drawing would have to decide which one of these candidates would sit as umpire. It might, therefore, be said that when lot had designated the umpire the question itself would thereby be decided. This is a situation of such a nature as might take away much of the confidence we must have in arbitration, and Mr. HEINRICH LAMMASCH believes that it would be preferable not to find a solution rather than to have recourse to the means proposed.

His Excellency Mr. **Alberto d'Oliveira** admits the justness of the remarks of Mr. HEINRICH LAMMASCH, but he fears that if the means always to secure the designation of an umpire is not indicated, it will be altogether too easy for a Power to choose a friend, inclined on occasion to spare it the necessity of having recourse to arbitration.

[714] Mr. **Kriege** fearing that the objections raised against the proposition of his Excellency Mr. ALBERTO D'OLIVEIRA may also affect the German propo-

[1] Annex **75.**
[2] Annex **8.**

sition [1] included under No. 31 *a* and *b*, desires to explain the singular situation in which this proposition is now placed.

The essential part of the German amendments has been incorporated in the Anglo-Germano-American project dealing with the international high court of justice. If this project is accepted, a solution of the problem will evidently be found. It will devolve upon the special committee established in that court, to indicate the umpire. One of the main tasks of that committee consists in settling the *compromis* when the two parties are agreed to avail themselves of the committee. But there are two hypotheses when the committee will be competent to settle the *compromis* at the request made by only one of the parties. One of these hypotheses which in the project appears only as a proposition of the German delegation, is that in case a general obligatory arbitration treaty should bind the Powers in dispute. In fulfilling this mission, the committee would be especially called upon to settle the difficulty. But if the provisions indicated in the project relative to the international high court of justice were not accepted, it would be well to consider the German propositions concerning Article 31.

The committee postpones the discussion of this matter until after committee B has concluded its work.

Mr. **Fromageot** observes that the words *"member of the Court"* found in the last paragraph of Article 24 do not correspond to the spirit of the provision to which they relate. This article seems to deprive the members of an arbitral tribunal when chosen outside of the list of the judges of the court, of the diplomatic privileges. And it further promises to be poorly interpreted and to appear to grant those privileges to all the members of the court even when they do not sit in the court.

The committee agrees with him to modify the phraseology of the article and decides to replace the words *"members of the court"* by *"members of the tribunal."*

Article 25 is then taken up.

ARTICLE 25

The tribunal of arbitration sits ordinarily at The Hague.

Except in cases of necessity, the place of session can only be altered by the tribunal with the assent of the parties.

Mr. **Fromageot** having called attention to the fact that this article is a duplicate of Article 36 of the Convention, his Excellency Baron **Guillaume** proposes to suppress the article which is but a useless remnant of a Russian project for the institution of a permanent court, and presented in 1899.

This proposition is adopted.

ARTICLE 26

The International Bureau at The Hague is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers, or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

(*No remarks.*)

[1] Annex 8.

[715]

ARTICLE 27

The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

Mr. **Heinrich Lammasch** thinks that it would be well to refer to committee A an examination of this article along with the Peruvian and Chilean propositions.[1] Committee C is too restricted to permit of its decision being imposed upon the subcommission, and it does not include any member of the delegations from Peru and Chile which have so vigorously proposed and supported these propositions.

This view-point is approved by the committee and Article 27 along with the amendments presented are referred to committee A.

ARTICLE 28

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It addresses to them an annual report on the labors of the Court, the working of the administration and the expenditure.

His Excellency Mr. **Alberto d'Oliveira** proposes to follow in the last paragraph of this article a usage which has already been adopted by the Permanent Bureau, that is to say, to include in the convention that the Permanent Bureau shall publish with its report an extract of all the arbitral decisions and stipulations concluded during the year to which it relates.

Upon the proposition of Mr. **Heinrich Lammasch** the following phraseology is adopted:

> It shall present to them . . ., as well as a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of the last paragraph of Article 22.

The meeting closes at 4 o'clock.

[1] Annexes 15 and 16.

SECOND MEETING

AUGUST 20, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 2: 45 o'clock.

The minutes of the first meeting are adopted.

The committee takes up the reading of Articles 29 and following of the Convention of 1899.

ARTICLE 29

The expenses of the Bureau shall be borne by the signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

His Excellency Baron **Guillaume** (reporter) raises the question as to the proportion in which the Powers that have adhered to the new Convention, shall bear the expenses of the Bureau. Shall they have to pay arrears of expenses? The signatory Powers have had to pay since the time of the affixing of their signatures, no matter what may have been the date of ratification; and it seems that the same principle should be applied and that adherents should be made to pay since the time of their adhesion.

Mr. **Fromageot** proposes to accept the principle established for the Bureau of the Universal Postal Union.

His Excellency Baron **Guillaume** reads aloud a note relating the opinions expressed upon this matter by the Administrative Council of the Permanent Court.

The **President** also thinks that the adhering Powers should only have to share the expenses of the Bureau from the time of their adhesion to the Convention.

He believes also that the question ought to be considered as to whether or not an adhering Power is held to share the expenses of the entire year in the course of which it gave its adhesion to the Convention.

Messrs. KRIEGE and FROMAGEOT are charged with the preparation of a new phraseology for Article 29.

[717]

ARTICLE 30

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules which shall be applicable to arbitration procedure, unless other rules have been agreed on by the parties.

(*No remarks.*)

ARTICLE 31

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are clearly defined the subject of the dispute and the extent of the arbitrators' powers. This act implies an engagement of the parties to submit in good faith to the arbitral award.

The **President** thinks that it would be well to combine in this article all that which relates to the *compromis*.

Mr. **Kriege** states that it would be best to reserve Article 31 until the time of the reading of the Convention, when the committee will be informed regarding the outcome of the German propositions.[1]

The committee adopts this manner of procedure.

As regards Article 22 of the Russian proposition,[2] Mr. **Kriege** proposes to connect the matter of the amount to be put at the disposal of the Bureau, with the examination of Article 57 of the Convention.

As regards Article 23 of the same project, his *new* provision consists in the request to be addressed to the Bureau for taking measures with regard to the installation of the arbitration tribunal; this provision might be inserted after paragraph 6 of Article 24 of the Convention.

Mr. **Fromageot** explains the Russian proposition by recalling the slowness frequently met with in the communication of the *compromis* to the Bureau. This has put the latter into a difficult situation.

Mr. **Heinrich Lammasch** remarks that Article 24 relates to the selection of the arbitrators, whilst the Russian proposition refers only to the *compromis*. It is, therefore, a distinct proposition. The discussion of Article 31 is postponed.

Article 32

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present act.

Failing the composition of the tribunal by direct agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

With regard to Article 2 of the French project,[3] the **President** states that the proposition forbidding the appointment of persons coming within the jurisdiction of the parties as umpire should be considered in connection with Article 32.

[718] Mr. **Heinrich Lammasch** explains this provision by the fact that in the French project the two arbitrators are already persons coming within the jurisdiction of the parties in dispute. The preferences of Mr. Lammasch are, however, rather for the exclusion of such persons from the number of judges in *small* disputes, in view of the fact that experience has taught that they vote always in favor of their country.

Mr. **Fromageot** declares such has not always been the case. He thinks that it is well to have in the tribunal a national judge who may always supply very useful historical and other information with regard to certain questions of fact of interest to his country.

Mr. **Kriege** states that Article 30 of the Convention entitles the parties to

[1] Annex 8.
[2] Annex 10.
[3] Annex 9.

the right of adopting special rules. Therefore, the French proposition does not seem to be necessary.

Mr. **Fromageot,** on the contrary, desires to see this proposition accepted as a rule of common law.

Mr. **Heinrich Lammasch** states, in reference to Article 32 of the Convention, that the exclusion of national judges from *small* judicial units seems to him more in conformity to the interests of arbitral justice.

If it is desired to have national judges in the tribunal, such tribunal should be composed of five and not of three members.

His Excellency Mr. **Alberto d'Oliveira** believes that full freedom should be left to the parties. He also remarks that according to the text of Article 32, the practice of common law is a tribunal composed of five arbitrators.

Mr. **Heinrich Lammasch** replies by saying that it would indeed be necessary to change the text of Article 32 by stating that each party shall appoint *one* or *two* arbitrators.

The **President** wonders if it would not be necessary to exclude from the tribunal all persons coming within the jurisdiction of the parties, while granting to agents the right to appear before the tribunal.

Mr. **Fromageot** protests against this suggestion, for the reason that agents are too closely bound to their mandataries to be admitted to appear before the tribunal and to be present at its secret deliberations.

The committee decides to fix as a rule of common law the number of five arbitrators of which two only may be chosen from amongst persons coming within the jurisdiction of the parties in dispute. Article 24 of the Convention will be modified, in consequence, and Article 32 shall in its paragraph 2 refer to Article 24.

Article 33

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

The wish proposed by the Argentine delegation with regard to this article [1] is not adopted by the committee.

After a short exchange of views, Article 33 is retained without modification.

Article 34

The umpire is *ex officio* president of the tribunal.
When the tribunal does not include an umpire, it appoints its own president.

[719] Mr. **Heinrich Lammasch** states with regard to the Russian proposition,[2] Article 33, that it seems dangerous to him. If the umpire is not as of course president, it would appear as though one were holding him under suspicion. On the other hand, arbitrators frequently do not know one another and do not know for whom to decide. Furthermore, by electing their president, they would appear to show preference for his country and, perhaps, for its cause

The Russian proposition is defeated and Article 34 is retained.

[1] Annex 13.
[2] Annex 11.

ARTICLE 35

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

(*No remarks.*)

ARTICLE 36

The tribunal's place of session is selected by the parties. Failing this selection the tribunal sits at The Hague.

The place thus fixed cannot, except in case of necessity, be altered by the tribunal without the assent of the parties.

The **President** desires to harmonize Article 36 with Article 11 relating to commissions of inquiry. The words "*except in case of necessity*" of paragraph 2 should, therefore, be struck out.

Mr. **Kriege** prefers to retain this restriction to the freedom of the permanent court whose headquarters should be less easily changed.

The **President** remarks that the parties have, however, freedom to select the seat of the tribunal, if they do so in the *compromis*.

The discussion of Article 36 is suspended.

The meeting closes at 4: 15 o'clock.

[720]

THIRD MEETING

AUGUST 23, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 5 o'clock.

The minutes of the second meeting are adopted.

The committee completes its discussion with regard to Article 36 of the Convention of 1899, which discussion was begun in the preceding meeting.

The **President** states that for paragraph 2 of this article, the committee might accept the text adopted by the committee of examination at the time of its discussion of the international commissions of inquiry, that is to say:

> This place of meeting once fixed cannot be altered by the tribunal without the assent of the Parties.

Adopted by the committee save the phraseology of it.

THE PRESIDENT proceeds with the reading aloud of Article 37.

ARTICLE 37

The parties are entitled to appoint delegates or special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defence of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The word "*delegates,*" the PRESIDENT further states, shall be suppressed in paragraph 1 of this article, even as it has been done with regard to the international commissions of inquiry. It shall read:

> The parties are entitled to appoint special agents to attend the tribunal. . . .

Two propositions, one of which is a Russian and the other a German proposition, refer to paragraph 2 of the same article, relating to the counsel or advocates appointed by the parties. The Russian project tends to forbid the members of the permanent arbitration court to plead before the court as counsel or advocates of the States in dispute, and to act in the quality of agents. The present convention leaves absolute freedom in this respect.

[721] The German project [1] is of an intermediate nature; it reads as follows:

> The members of the permanent court may not act as delegates, agents or advocates, except on behalf of the Power which appointed them members of the court.

Mr. **Kriege** gives an explanation of the German proposition.

[1] Annex 12.

In principle it seems certainly but little opportune, the speaker states, to grant to a judge the right to perform also the functions of delegate or of advocate. The fair repute of his impartiality can but suffer from it. On the other hand, it is difficult to deprive a State of the services of the most eminent of its jurisconsults. For this reason the German proposition seems to him preferable. Nevertheless, if it should not be adopted, he would not be opposed to having the matter settled conformably to the proposition of the Russian delegation.

His Excellency Baron **Guillaume** prefers the provisions adopted in this matter by the Convention of 1899; he would, nevertheless, concur in the proposition of the German delegation, but he does not adhere to the Russian project. This project might bring about an inferiority in the quality of the judges of the arbitration court, for the reason that some of them might perhaps refuse to appear under such conditions upon the list of the members of the Hague tribunal.

Through scruples of impartiality, Belgium has excluded judges of the nationality of the parties from all her arbitration treaties.

For lack of national judges, Baron GUILLAUME would grant full freedom to the parties to choose their advocates.

Mr. **Heinrich Lammasch** prefers, in principle, the Russian proposition; but he recognizes that from practical view-points it offers difficulties. The argument set forth by Baron GUILLAUME that members of the permanent court might refuse to exercise their functions as judges if they could not also, at the same time appear as advocates, does not seem convincing to him. He adheres to the German proposition.

Mr. **Fromageot** does not approve of the Russian proposition. A country cannot be expected to deprive itself in advance of the services of competent persons. Political questions requiring the aid of the most competent men may arise.

He would be rather in favor of the German proposition; but he prefers the present text of Article 37.

His Excellency Mr. **Alberto d'Oliveira** agrees to the German proposition in declaring that the present provisions of Article 37, have, nevertheless, certain advantages.

After an exchange of views between the **President** and the members of the committee, Article 37 of the German proposition is accepted, with a slight modification: the word *"counsel"* shall be added to the original text.

The text shall, therefore, read as follows:

> The members of the permanent court may not act as delegates, agents, counsel or advocates, etc.

The **President** reads aloud Article 38:

ARTICLE 38

The members of the permanent court may not act as delegates, agents, counsel or advocates, etc.

Mr. **Kriege** sets forth the advantages which, in his judgment, are derived from Article 38 of the German proposition.[1] Experience has shown that

[1] Annex 12.

[722] one cannot without inconvenience make it the duty of the tribunal to decide the matter of the language to be used. Confronted by the propositions made by the parties, propositions which may perhaps be opposed to each other, the arbitrators are placed in a delicate situation. Whatever decision they reach, they run the risk of arousing suspicion from the very beginning of their labors. If, on the contrary, the matter is to be settled by the *compromis,* the difficulty would be removed. The German proposition which is identical with that of the Russian delegation,[1] pursues the object of realizing the wish expressed by the arbitrators in the conflict relative to the California Pious Fund.

Mr. **Fromageot** states that he regards the proposition as somewhat strict in attributing to the *compromis* the designation of the languages of which the tribunal shall make use and the use of which is to be authorized before it. This matter is not of capital importance. It is of the highest value to have good arbitrators perfectly acquainted with international law, conversant with the commercial affairs and the interests of the parties and rendering good decisions. The matter of languages concerns rather the arbitrator than the parties; it is important that he should be familiar with the language that he is to use in the exercise of his functions. It was thought in 1899 that it should devolve upon the arbitrators to choose the language of which they shall make use.

With reference to commissions of inquiry, the speaker further states that Mr. Mérey and Mr. Heinrich Lammasch have lately remarked that the arbitrators were not always agreed as to the matter of languages and, therefore, that it would be well to provide for this matter in the *compromis.*

This is an excellent measure, on the condition that it be left optional, and not given an obligatory character. If the arbitrators do not succeed in coming to an understanding, Governments would be even less apt to do so.

More than once arbitrators have been displaced before they had performed their mission, because they were not sufficiently familiar with the language that had been imposed upon them. Mr. Fromageot is not a partisan of a rule altogether too strict; he would give a certain elasticity to it.

Mr. Kriege replies by stating that before choosing an arbitrator inquiry might be made to see if he is acquainted with the language expected to be used before the tribunal. The inconvenience which consists in not being able to appoint this or that person because of unfamiliarity with the language intended to be used does not seem to him to be as serious as the consequences of the present system.

Mr. Heinrich Lammasch is not unaware of the fact that the situation of the arbitrators might become very delicate if they were to decide the language to be used before the tribunal; but, on the other hand, he admits the correctness of the remarks of Mr. Fromageot. Mr. Lammasch is of the opinion that the matter of languages should be settled without too much rigidity in the *compromis.*

The **President** wonders what will happen in case the parties come to no agreement because of ill-will on their part.

Mr. **Kriege** replies by stating that in order to settle the *compromis,* the parties have to come to an understanding with regard to quite a different set of other questions, and that if they succeed in settling these, they will also succeed in solving the question of languages. If we admit the hypotheses that the parties do not act in good faith, they will meet with difficulties everywhere.

[1] Annex 11.

The **President** and the members of the committee now engage in an exchange of views from which issues the general desire to find a plan which might conciliate the two opinions presented with regard to the matter of languages. The following formula is proposed:

> If the question as to what language is to be used is not settled by the *compromis,* it shall be decided by the tribunal.

[723] The committee passes on to Article 39 to which the German delegation has presented an amendment.

ARTICLE 39

As a general rule arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of all printed or written acts and of all documents containing the grounds relied on in the case. This communication shall be made in the form and within the time fixed by the tribunal in accordance with Article 49.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

Mr. **Kriege** explains in a few words the German amendment [1] which reads as follows:

> The *compromis* shall determine the form and the time in which this communication shall be made.

It has been suggested by experience gained in different arbitration cases and especially in the case of the California Pious Fund. On the one hand, we are to establish a distinction between the two separate phases of the procedure, that is to say, between the written proceedings and the debates, a distinction which is not always strictly observed. On the other hand, the tribunal being charged with determining the delays and the form of the communications to be made between the parties in the course of the written proceedings, it would be necessary to call the arbitrators together from several parts of the world, solely in view of this preparatory formality. The German proposition desires to spare them these preliminary journeys which are useless and costly. If the matters regarding the written proceedings are settled in the *compromis,* the meeting of the arbitrators will be necessary only at the time fixed for the beginning of the discussions. It is this which is expressed in the new Article 40 *a* which is proposed by the German delegation.

Mr. **Fromageot** fully concurs in the reasons indicated by Mr. KRIEGE.

He believes, however, that it would be more prudent not to establish, for the closing of the written proceedings, a fixed delay indicated in advance and irrevocably in the *compromis* itself.

As for the communications, while he recognizes the great usefulness of the diplomatic channels in certain cases, he calls the attention of the committee to the advantage to be gained in constituting the tribunal with the beginning of the proceedings, in order to take the matter, as soon as possible, out of the hands of the chancelleries which will frequently feel embarrassed in fulfilling the rôle of summoner.

[1] Annex 12.

His Excellency Mr. **Alberto d'Oliveira** believes that for the proper appreciation of cases submitted to arbitration, a certain latitude ought to be allowed the arbitrators for the fixation of the delays. Certain circumstances may make it necessary to extend such delays, especially with regard to arbitrations dealing with colonial matters. And in this connection he refers to the Berne arbitration in the case of the Lorenço Marques railway, in which such extensions covered several years, in order to permit of the necessary expert surveys on the spot.

In the course of an exchange of views in which the **President**, Mr. **Fromageot** and Mr. **Heinrich Lammasch** take part, Mr. **Kriege** further explains the reasons of the proposition. He does not think that the fixation [724] of the delays made in the *compromis* might give rise to difficulties in the course of the procedure. In this connection he refers to the amendments proposed by the German delegation to Articles 42 and 43,[1] which form a complement to the proposition under discussion. According to the text of this amendment the tribunal, in certain circumstances, will have to consider new papers or documents presented by the parties.

Mr. **Heinrich Lammasch** believes that the proposition to which Mr. KRIEGE has alluded will not suffice to relieve the fears arising from his amendment to Article 39.

For the latter deals with documents of the proceedings, with memoirs and counter-memoirs which the parties exchange before the debates—whilst Article 42 deals with special documents, with documentary proof.

As regards the latter, the German proposition is perfect; but he calls for more elasticity in the phraseology of the passage concerning the former; he believes it also useful to permit the parties, if necessary, to extend the period of the written proceedings.

The **President** doubts whether the distinction made by Mr. LAMMASCH comes within the juridical terminology of the Convention, and he further calls attention to the fact that Articles 39, 42 and 43 refer only in a general way to papers and documents. The German proposition dealing with Articles 42 and 43 follows this terminology.

He also states that the entire committee is agreed to admit that the communication of papers and documents may be carried out both through diplomatic channels and through the medium of the International Bureau; that all the members of the committee are unanimous in stating that it would be useful if the delay for this communication were fixed in the *compromis* itself.

There is one more matter to be solved: The character to be given to the fixation of this delay. The committee will endeavor to take up this matter in its next meeting.

The PRESIDENT requests Mr. KRIEGE to prepare the phraseology for Article 39, and Mr. HEINRICH LAMMASCH to prepare that for Article 32.

The meeting closes at 7 o'clock.

[1] Annex 12.

[725]

FOURTH MEETING

AUGUST 27, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 2:15 o'clock.

The committee continues the discussions regarding Article 39 of the Convention of 1899 begun in the preceding meeting.

The minutes of the third meeting are adopted.

The **President** explains that according to the present Convention, the proceedings of the dispute, that is to say, the communication made by the respective agents to the members of the tribunal and to the adverse party of all printed or written papers and of all documents containing the means invoked in the case, must take place in the form and within the periods determined by the tribunal, whilst according to the proposition of the German delegation,[1] the *compromis* is to determine the form and the periods in which such communication shall be made.

In principle, the PRESIDENT states, the committee has come to an agreement upon this proposition; objections have been raised with regard to the matter. We are now to examine if the satisfaction given to these objections by Articles 42 and 43 of the German project will be considered as sufficient.

Mr. **Heinrich Lammasch** declares that the reservations included in Articles 42 and 43 of the German proposition are applicable only in case of an agreement between the parties or because of *force majeure* or of unforeseen circumstances. It might, however, be useful for one of the parties to have the right to produce documents with a view of refuting allegations made during the debates by the adverse party. In consequence, the speaker proposes to add to Articles 42 and 43 of the German project, after the words "*of force majeure or unforeseen circumstances,*" the words:

> or the submission of which would be necessary to refute an allegation made by the adverse party in the course of the debates.

The amendment is adopted.

Mr. **Heinrich Lammasch** is not yet certain if the provisions contained in Article 39 of the German project will suffice to meet all eventualities.

[726] Thus the article under discussion does not provide for the case when, for any reason whatever, the submission of the cases or of the counter-cases could not be effected in the prescribed periods.

May the parties submit cases and counter-cases in the course of the debates?

Mr. **Kriege** replies by stating that with the exception of the four cases

[1] Annex 12.

enumerated in the German proposition, and in the amendment of Mr. LAMMASCH, no further cases and counter-cases may be submitted after the expiration of the prescribed periods.

Mr. **Fromageot** remarks that unforeseen circumstances may make it impossible to observe the periods fixed for the submission of cases and counter-cases.

Mr. **Kriege** declares that the proposition of the German delegation is based upon a wish expressed by eminent jurists such as Sir EDWARD FRY, Messrs. MARTENS, ASSER, etc. He believes that the reservations included in this proposition are of a nature which will provide for all the cases which should be given attention. The parties doubtlessly possess the absolute right orally to complete the written explanations previously furnished by them and to reply in this manner to the last case of the adverse party. It is not necessary to submit writings during the debates, for the verbal declarations are recorded in the protocol.

When the proceedings have come to a close, Mr. KRIEGE says, it is preferable no longer to exchange cases and counter-cases in order to avoid a useless prolongation of the debates.

Mr. **Fromageot** fears that the reservations mentioned by Mr. KRIEGE will not sufficiently relieve the rigors of a too strict rule.

Mr. **Kriege** states that without fixed rules one is exposed to the dangers of abuses. If alongside of the four reservations aforementioned other exceptions were admitted, it would be difficult for the tribunal to deny requests for delay more or less justified and which the parties might submit.

His Excellency Sir **Edward Fry** proposes the following amendment:

> The tribunal shall have the right to extend the time fixed by the *compromis* when it considers it necessary for the purpose of reaching a just decision of the dispute.

This provision, states his Excellency Sir EDWARD FRY, while giving greater freedom to the tribunal, would be of general utility.

The **President** and members of the committee engage in an exchange of views the result of which sets forth the difference existing between the German proposition and that of his Excellency Sir EDWARD FRY.

Mr. **Kriege** states that it would be necessary to distinguish between the two phases of the procedure: the proceedings and the debates. The German delegation sees no benefit arising from the intervention of the tribunal in the first phase; it seems to him more advantageous to leave it to the *compromis* to settle all matters of procedure. The oral debates will amply permit the parties to produce their means of proof. Furthermore, the four reservations that have this day been referred to, make it possible to submit new papers and documents.

The **President** and his Excellency Baron **Guillaume** request Mr. KRIEGE to inform them if, according to the German proposition, the delays prescribed by the *compromis* for the exchange of cases and counter-cases may be
[727] modified in virtue of one of the four reservations referred to in the course of the debates of this day.

Mr. **Kriege** replies by saying that according to his proposition the delays fixed by the *compromis* for the exchange of cases can be modified only in agreement with the parties.

His Excellency Sir **Edward Fry** and Messrs. **Heinrich Lammasch** and **Eyre**

Crowe explain with arguments in support that it is indispensable to admit an extension of the periods fixed in the *compromis* for the submission of cases and counter-cases.

Mr. **Heinrich Lammasch** presents in this sense the following proposition:

> The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal if the latter is of opinion that one of the parties had been unable to observe them by reason of unforeseen circumstances.

After a general exchange of views concerning the amendment of Mr. HEINRICH LAMMASCH, this amendment is adopted by substituting in the place of the words "*or by the tribunal if the latter is of opinion . . .*," the words:

> or by the tribunal when the latter considers it necessary for the purpose of reaching a just solution.

In order to make it clear that the delays contemplated by Article 39 refer especially to cases, counter-cases and replies of the parties in dispute, whilst the submission of such documents should no longer be permitted in the course of the debates, Mr. **Heinrich Lammasch** proposes to insert into Article 39 the words "*cases, counter-cases and replies.*"

This proposition is adopted.

The **President** reads aloud Articles 42 and 43 of the German project[1]

NEW ARTICLE, REPLACING ARTICLES 42 AND 43

After the close of the pleadings, the tribunal shall refuse discussion of all new papers or documents to which the agents or counsel of the parties may call its attention.

The tribunal shall, however, take into consideration all new papers or documents which both parties shall agree to produce, or the production of which could not be made sooner by reason of *force majeure*, or unforeseen circumstances. The tribunal shall decide, in case of doubt, the question of whether these conditions are fulfilled.

The first paragraph meets with no objections.

The second paragraph gives rise to general discussions as a result of which the committee decides to retain the present Articles 42 and 43.

The **President** reads aloud Article 40:

ARTICLE 40

Every document produced by one party must be communicated to the other party.

The PRESIDENT states that the German proposition[2] contains an Article 40 *a*. The discussion of this article is postponed.

Mr. **Fromageot** states apropos of Article 40 of the Convention of 1899 that it would be difficult for the parties to communicate the original of the
[728] documents as in the case of the ordinary tribunals. This proceeding seems to him inapplicable because of the frequently great distance which separates the parties one from the other. It would be best to borrow the text of Article 40 concerning the maritime prize court, and to add to Article 40 of the

[1] Annex 12.
[2] *Ibid.*

Convention of 1899, after the words *" be communicated,"* the words *" in the form of a duly certified copy."*

The amendment is approved.

Article 41 of the Russian proposition is not accepted.[1]

The **President** reads aloud the present Article 41 which is accepted.

ARTICLE 41

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes alone have an authentic character.

The present Articles 42 and 43 have already been accepted.

ARTICLE 42

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 43

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

The meeting closes at 4 o'clock.

[1] Annex 11.

[729]

FIFTH MEETING

SEPTEMBER 2, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 9: 30 o'clock.

The minutes of the fourth meeting are approved.

The **President** proceeds with reading aloud Articles 44, 45 and 46 of the Convention of 1899 which give rise to no remark.

ARTICLE 44

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal, the tribunal takes note of it.

ARTICLE 45

The agents and counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defence of their case.

ARTICLE 46

They are entitled to raise objections and points. The decisions of the tribunal on these points are final, and cannot form the subject of any subsequent discussion.

He reads aloud Article 47.

ARTICLE 47

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put nor the remarks made by members of the tribunal in the course of the discussions can be regarded as an expression of opinion by the tribunal in general, or by its members in particular.

Messrs. **Heinrich Lammasch** and **Kriege** point out an error in the text of this article, in which occur the words *"to the agents counsel of the parties"* instead of *"to the agents and counsel."*

[730] The **President** reads aloud Article 48.

ARTICLE 48

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of international law.

His Excellency Sir **Edward Fry** calls for the suppression of the word *"international,"* at the end of the article.

The proposition is adopted.

The **President** passes on to Article 49.

ARTICLE 49

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms and time in which each party must conclude its arguments [*prendre ses conclusions*], and to arrange all the formalities required for dealing with the evidence.

The German proposition [1] includes the following amendment to this article:

Strike out the second member of the sentence: "to decide . . . conclude its arguments."

After the reading of the said article the members of the committee exchange views concerning the exact meaning of the [French] word "*conclusions*."

Mr. **Fromageot** states that by "*conclusions*" he understands the exact and concise summary of the request, with reasons stated, of each of the parties, a summary which is submitted to the tribunal at the close of the proceedings. The entire case having thus been condensed into but a few pages, the work of the judge is simplified, and he can the more easily draft his decision.

The [French] word "*conclusions*" has the same meaning as the German word "*Schlussanträge*." The *conclusions* may be presented to the tribunal only after the submission of the cases, counter-cases and verbal explanations.

Mr. **Heinrich Lammasch** believes that it is not always necessary to submit written *conclusions*. Such a step may be useful in complicated cases as guidance for the arbitrators. He believes it preferable to leave to the tribunal the right to decide if it is necessary to submit *conclusions*. The tribunal must not be compelled to accept this measure, even in case the two parties were agreed upon the matter.

The committee decides to retain Article 49 which already contains the idea that the submission of *conclusions* is not obligatory.

It is agreed to add to this article, after the word "*conclusions*," the word "*final*."

Article 50 is now read aloud.

It gives rise to no remark.

ARTICLE 50

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case, the president pronounces the discussion closed.

[731] The **President** reads aloud Article 51.

ARTICLE 51

The deliberations of the tribunal take place in private. Every decision is taken by a majority of members of the tribunal.

The refusal of a member to vote must be recorded in the minutes.

The German project [2] includes an Article 51 *a* reading as follows:

If the decision requires some act in execution thereof, the arbitral sentence shall fix a period within which execution must be completed.

[1] Annex 12.

[2] *Ibid.*

Mr. **Fromageot** states that while he recognizes for certain cases the utility of the provisions proposed by the German delegation, it devolves upon the interested party to demand a delay, and not upon the tribunal to determine the same. This step constitutes a supplementary request of condemnation; it must issue, not from the tribunal, but from the interested party.

The **President** sets forth the practical value of the German proposition An article in this sense was included in the general arbitration treaty between Italy and Argentina in 1898.

Mr. **Heinrich Lammasch** states that the project of General PORTER dealing with contract debts contains the same clause as Article 51 *a* of the German proposition. The speaker would admit the German amendment if the words "upon the request of the parties" were added to it.

Mr. **Kriege** explains that difficulties may arise between the parties; it is possible that one of them may not consent to fixing a delay of execution. In establishing a rule, the danger of keeping the case in suspense would be avoided. The tribunal is in a position to determine an equitable delay.

Mr. **Eyre Crowe** declares that the fixation of an exact period seems to him hardly justified. Execution of an arbitral sentence within a fixed period of time cannot be required except as the result of a contrary convention. There are formalities to be fulfilled, and unforeseen circumstances may delay the execution of the decision. It is best to leave it for the *compromis* to stipulate the fixation of a period. There is no analogy between this case and the provisions of the project of General PORTER which contemplates the suppression of the use of armed force in certain cases. This is quite different.

It does not behoove the arbitration court to fix the time when the decision shall be carried out. Its rôle consists in judging, and in rendering decisions.

His Excellency Sir **Edward Fry** states that the court has no power to have its decisions carried out; this depends on the good-will of the parties, on their good faith. Any measure of a coercive appearance must be avoided.

Mr. **Kriege** explains that the German proposition calls for the intervention of the tribunal when the parties neglect to formulate a request for the fixation of a period; or when they are not agreed upon this matter. The utility of this provision seems to him self-evident, for it removes any misunderstanding.

Mr. **James Brown Scott** proposes the following words as an addition to the German amendment:

> If the *compromis* does not fix a period.

[732] It is especially when the parties are not agreed, so states Mr. **Eyre Crowe**, that the tribunal must steer clear of fixing the period.

Mr. **Heinrich Lammasch** believes that it lies in the nature of the arbitral decision to fix the periods, but in order to satisfy his Excellency Sir EDWARD FRY and Mr. EYRE CROWE, the new Article 51 *a* might perhaps be modified as follows:

> . . . in so far as the *compromis* does not exclude it, the arbitral sentence shall fix a period. . . .

Mr. **Fromageot** declares that two questions arise in this connection:

1. Has the tribunal the right to fix the periods as of course?
2. May one of the parties demand the fixation of a period without the consent of its adversary?

To the speaker the first of these questions seems inadmissible; as to the second, it presents no difficulties when it is regulated in advance by the *compromis*.

In the contrary case, may one of the parties request the fixation of a period?

The **President** and Mr. **Kriege** reply in the affirmative.

Mr. **Fromageot** calls attention to the fact that the commission is not now dealing with suits between private individuals, and that, in his opinion, in any questions submitted to arbitration, care should be taken not to go beyond the limits of the *compromis*.

Mr. **Eyre Crowe** states that the mission of arbitration is to judge and not to fix periods. He fears that in adopting the German proposition, the gate may be closed to numerous cases.

His Excellency Sir **Edward Fry** holds the opinion opposed to that expressed by Mr. KRIEGE.

Mr. **Heinrich Lammasch** proposes to add to the German Article 51 *a* the words:

in so far as the *compromis* does not exclude it.

After an exchange of views the committee decides not to accept Article 51 *a* of the German proposition.

ARTICLE 52

The award, given by a majority of votes, must state the reasons on which it is based.

The **President** calls attention to the wish of the Netherland delegation, transmitted by Mr. LOEFF, to the end of suppressing the last paragraph of the said article, reading as follows:

Those members who are in the minority may record their dissent when signing.

Mr. **Heinrich Lammasch** cites Articles 31 and 34 dealing with the permanent court, and the old Article 42 concerning the Prize Court. The decisions of these two courts are signed only by the respective president and recorder.

Following the general discussions, and while in principle accepting that the decision shall be signed by the president and by the recorder, the committee reserves the final phraseology.

ARTICLE 53

The award is read out at a public sitting of the tribunal, the agents and counsel of the parties being present or duly summoned to attend.

Article 53 gives rise to no remark.

[733] ARTICLE 54

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitively and without appeal.

The **President** reads aloud Article 54 as well as a new Article 54 a, proposed by the Italian delegation,[1] for which he states the reasons and sets forth the advantages:

[1] Annex 14.

Any dispute arising between the parties as to the interpretation and execution of the arbitral award shall be submitted to the decision of the same tribunal which pronounced it.

His Excellency Sir **Edward Fry** does not accept this article. He states that a new dispute requires a new *compromis*, and in such case there must be a new arbitration.

Mr. **Heinrich Lammasch** proposes to add to the article in question the words:

in so far as the *compromis* does not exclude it.

His Excellency Sir **Edward Fry** accepts the article thus amended.

Mr. **Lange** thinks that this article is very useful, and he states that it would be advantageous to have the same judges for the matters of the interpretation and the application of the decision.

The committee proceeds to voting upon Article 54 *a* of the Italian proposition.

The article is accepted with the modification proposed by Mr. LAMMASCH.

Mr. **Lange** believes it useful to have it established in Article 31, the phraseology of which has been reserved, that it pertains to the *compromis* to decide the matter of the rights of the tribunal in this respect.

ARTICLE 55

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

The **President** calls attention to the fact that the Russian proposition [1] calls for the suppression of this article.

In consequence of an exchange of views, the committee decides to retain the present Article 55.

ARTICLE 56

The award is binding only on the parties who concluded the *compromis*.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter notify to the former the *compromis*
[734] they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

The **President** calls attention to the fact that arbitration may take place without a *compromis*. It is more regular to say "*the Powers that have taken part in the suit*," than "*the Powers that have concluded a compromis*."

The discussion of this article is suspended.

[1] Annex 11.

ARTICLE 57

Each party pays its own expenses and an equal share of the expenses of the tribunal.

The German and Russian propositions contain identical amendments in regard to this article.

Article 57 is referred to the *compromis*.

The **President** reads aloud Articles 58, 59, 60 and 61.

General provisions

ARTICLE 58

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers that were represented at the International Peace Conference at The Hague.

ARTICLE 59

Non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known their adhesion to the contracting Powers by a written notification addressed to the Netherland Government, and communicated by it to all the other contracting Powers.

ARTICLE 60

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 61

In the event of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals thereto.

Done at The Hague, July 29, 1899, in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

[735] After an exchange of views concerning the modifications to be introduced in these articles, the committee decides to refer them to the drafting committee. It requests Messrs. KRIEGE and FROMAGEOT to draft the project of an article concerning notifications and proofs to be introduced after Article 49.

The **President** proceeds with the reading of the French draft of a plan to supplement the Hague Convention of July 29, 1899, concerning the pacific settlement of international disputes.[1]

ARTICLE 1

General provision

The system here given is drawn up solely with a view to facilitate the operation of the Hague Convention so far as it concerns certain disputes; as to points not covered by

[1] Annex 9.

it, reference is had to the provisions of the Convention of 1899 so far as they would not be contrary to the principles of the rules here given.

Mr. **Kriege** states that the insertion of the French draft into the convention would not be possible in case this draft were to be inserted therein as a new chapter.

His Excellency Sir **Edward Fry** would wish that the disputes referred to in Article 1 might be better defined.

The article is adopted save its phraseology.

The **President** reads aloud Article 2.

Article 2

Organization of the tribunal

Each of the parties in dispute shall call upon a qualified person from among its own *ressortissants* to assume the duties of arbitrator. The two arbitrators thus selected shall choose an umpire. If they do not agree on this point, each of them shall propose a candidate, not a *ressortissant* of any of the parties, taken from the general list drawn up in accordance with the Hague Convention of 1899; which of the candidates thus proposed shall be the umpire shall be determined by lot.

The umpire presides over the tribunal, which gives its decision by a majority vote.

If one party so requests, each of the parties shall appoint two arbitrators in place of one, and the four arbitrators shall proceed to designate the umpire in the manner above indicated.

His Excellency Sir **Edward Fry** calls for the suppression of the words: from among its own *ressortissants*.

Mr. **Heinrich Lammasch** concurs in the request of his Excellency Sir Edward Fry; he explains his views concerning the selection of the umpire and he states that he is not a partisan of any procedure based upon chance.

The members of the committee express their judgment concerning the organization of the arbitral tribunal.

Mr. **Fromageot** explains in detail the advantages of Article 2 of the French proposition. The provisions of paragraph 1 of this article contemplate facilitating arbitration in restricting as far as possible the formalities and the delays resulting therefrom. For cases of but little importance these provisions are very useful; they do away with the intervention of chancelleries. Mr. Fromageot [736] thinks that the impartiality of the arbitrators on the list drafted in virtue of the Convention of 1899 is incontestable. Furthermore, the parties are free to act at their pleasure. The French delegation proposes to them a new system which it deems good, with but a sole arbitrator. France has made use of this system in her treaty of commerce with Switzerland.

Mr. **Kriege** suggests the following: If the two Powers do not come to an understanding regarding the person of the umpire, each party shall choose a Power, and these Powers shall designate each one person. Drawing of lots shall determine which of these persons shall perform the functions of umpire. This way would be sufficiently rapid and insure the impartiality of the judgment.

Mr. **Heinrich Lammasch** states that apart from cases of incorrect partiality, it may happen that the juridical opinion of the arbitrator is expressed in his works. By according to the parties the right of choosing each three candidates for the selection of the umpire, in the place of only one, the dangers of a

partial judgment would be diminished. The speaker sets forth the difference existing between a world treaty and one concluded between two or three Powers.

Mr. **Fromageot** replies by stating that the number of candidates proposed by Mr. LAMMASCH seems to him too high, to which Mr. LAMMASCH suggests granting to the parties the right of naming each two candidates for the selection of the umpire only, instead of three.

After an exchange of views in regard to this matter the committee proceeds to take a vote upon the second amendment of Mr. HEINRICH LAMMASCH. The amendment is accepted in the sense that each of the parties shall present two candidates; and the committee also accepts the modification proposed by his Excellency Sir EDWARD FRY to paragraph 1 of Article 2 of the project of the French delegation (suppression of the words: "its own *ressortissants*").

The committee passes on to *paragraph 3 of Article 2 of the French draft.*

Mr. **Lange** thinks it proper to suppress this paragraph. The number of three arbitrators seems preferable to him instead of five for the summary procedure. By appointing five arbitrators it would be best to proceed in accordance with the indications of Article 32 of the Convention of 1899.

The committee concurs in the suggestion made by Mr. LANGE.

Mr. **Fromageot** states that he will consult his delegation upon this matter.

Mr. **Kriege** would desire to add to Article 2, paragraph 1, the words "*or appointed*" after the word "*ressortissants.*"

The **President** states that the phraseology will be reserved.

ARTICLE 3

Meeting-place of the tribunal

In the absence of an agreement concerning the meeting-place of the arbitral tribunal this place shall be determined by lot, each party proposing a given city.

The Government of the country where the tribunal is to meet shall place at its disposition the staff and offices necessary for its operation.

Mr. **Fromageot** states that the French delegation desired to meet the case if the tribunal should not sit at The Hague. It would be of little practical value for the parties to have decided at The Hague a dispute relating either to unimportant matters or to technical matters.

[737] Mr. **Heinrich Lammasch** proposes to insert paragraph 2 of Article 3 of the French proposition in the text of Article 36 of the Convention of 1899.

His Excellency Sir **Edward Fry** does not approve of the provisions of paragraph 2.

The **President** states that the following words might be added to the text of this paragraph: "with the previous consent of the State where the tribunal is to meet" and to insert paragraph 2 thus modified into Article 36 of the Convention of 1899.

Mr. **Fromageot** admits that this concerns a matter of courtesy and delicacy; he states that he is in agreement in this respect with the PRESIDENT and Mr. LAMMASCH.

The committee decides to suppress paragraph 2 of Article 3 of the French project and to have expressed by Article 36 of the Convention of 1899 the idea that it will be necessary previously to secure the consent of the Power within

whose territory the tribunal shall meet. Article 36 of the Convention of 1899 will, in consequence, be modified.

The **President** reads aloud Article 4.

ARTICLE 4

Procedure

When the tribunal has been formed according to the first article, it shall meet and settle the time within which the two parties must submit their respective cases to it.

His Excellency Sir **Edward Fry** asks if the period within which the two parties shall submit their respective cases to the tribunal may not be fixed before the meeting of the court.

Mr. **Heinrich Lammasch** replies by saying that the period may even be fixed through correspondence.

The **President** proposes the suppression of the words *"meet and"* of Article 4.

Mr. **Fromageot** calls attention to the fact that the arbitration *compromis* may be settled long before the time when the tribunal will declare itself constituted.

His Excellency Sir **Edward Fry** says, in consequence, that the tribunal may, if the *compromis* has not done so, determine the period.

He proposes to complete Article 4 in the following manner:

> Save a convention foreseen in the *compromis* between the parties in dispute, the tribunal shall fix the period. . . .

Mr. **Fromageot** would have it expressed:

> For lack of a previous agreement, the tribunal, as soon as it is constituted, shall fix the period within which the parties are to submit their respective cases to it.

Mr. **Heinrich Lammasch** would like to know if this includes as well counter-cases.

His Excellency Sir **Edward Fry** replies by stating that it deals only with cases.

Mr. **Heinrich Lammasch** would like to know if the tribunal may exclude counter-cases.

Mr. **Fromageot** replies in the affirmative.

Article 4 is adopted in the text formulated by Mr. FROMAGEOT.

[738]

ARTICLE 5

Each party shall be represented before the tribunal by an agent, who shall serve as intermediary between the tribunal and the Government which appointed him.

(*No remarks.*)

ARTICLE 6

The proceedings shall be conducted exclusively in writing. Each party, however, shall be entitled to ask that witnesses be heard. The tribunal shall, on its part, have the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses, whose appearance in court it shall consider useful.

In order to ensure the summoning or hearing of these experts or witnesses, each of the contracting parties, at the request of the tribunal, shall lend its assistance under the same conditions as for the execution of letters rogatory.

His Excellency Sir **Edward Fry,** and Messrs. **Kriege, Heinrich Lammasch and Fromageot** enter into an exchange of views as a result of which the committee recognizes that according to the British law, experts are at the same time regarded as witnesses or in some cases as assessors, whilst in Germany and France an expert is not a witness. It will, therefore, be necessary to modify the article to read as follows:

to ask that witnesses and experts appear.

The amendment is accepted.

The **President** reads aloud Article 7.

ARTICLE 7

If the dispute relates to the interpretation or application of a convention between more than two States, the parties between which it has arisen shall notify the other contracting parties of their intention to resort to arbitration and advise them of the arbitrators chosen by them.

The parties thus notified shall have the right to name arbitrators to form the tribunal in addition to the arbitrators designated by the Powers which have made the notification. If, within a month after this notification, any party has not designated an arbitrator of its choice, that Power will be understood to accept any decision which may be rendered.

The umpire shall be designated as indicated by Article 1, except that where there are more than five parties to the dispute, the restrictive clause relating to the nationality of the umpire shall not be applied. The umpire shall have the deciding vote in case of an equal division.

After short discussions between the **President** and Messrs. **Kriege, Heinrich Lammasch** and **Fromageot,** the committee agrees to discuss this article at the same time as Article 56, with which Article 7 is connected.

ARTICLE 8

Expenses

The expenses of the arbitration shall be borne equally by the parties to the dispute.

(*No remarks.*)

The meeting closes at the hour of noon.

[739]

SIXTH MEETING

SEPTEMBER 6, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 5: 30 o'clock.

The minutes of the fifth meeting are approved.

The **President** states that the provisional text of Articles 20 and following of the Convention of 1899 and of the draft of a supplementary plan of the French delegation [1] adopted by committee C, has been distributed to the members of the committee. He takes up the second reading of the said articles.

Articles 20 and 21 are adopted, under reservation of modifications eventually to be made therein as a result of the discussions of committee B.

ARTICLE 20

With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

Article 22 leads to no remarks.

ARTICLE 22

An International Bureau, established at The Hague, serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the International Bureau at The Hague, *as soon as possible*, a duly certified copy of any conditions of arbitration
[740] arrived at between them and of any award concerning them delivered by a special tribunal.

They undertake likewise to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

The **President** reads Article 23.

ARTICLE 23

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

[1] Annex 9.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments may be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed.

The **President** and Messrs. **Eyre Crowe, Kriege** and **Fromageot** enter into an exchange of views for the purpose of establishing whether the substitutes for the members of the court, deceased or retired, are appointed for a term of six years or for the period of time during which the latter would still have been in office.

The committee decides to add the following paragraph at the close of Article 23:

In such case, this appointment is made for a fresh period of six years.

The article thus amended does not give rise to any other objections.

ARTICLE 24

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by direct agreement of the parties. the following course is pursued:

Each party *appoints two arbitrators,* of whom one only *can be its ressortissant or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators* together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

The tribunal being thus composed, the parties notify to the Bureau *as soon as possible* their determination to have recourse to the Court and the names of the arbitrators.

[741] The tribunal of arbitration assembles on the date fixed by the parties.

The members *of the tribunal,* in the performance of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Mr. **Heinrich Lammasch** wishes to take up once more Article 24, although the said article has already been discussed in a first reading. The question has changed since the acceptance of the French proposition regarding summary procedure, allowing three arbitrators, whilst the article referred to mentions five. The difference between summary procedure and regular procedure not being very great, it would seem that the characteristic feature of the latter consists in the number of members who are to constitute the tribunal.

It might be presumed that the Conference had preferences for a tribunal of five members, if the present phraseology of Article 24 were adopted. But practice has shown that a tribunal composed of three members was perfectly capable

of rendering good decisions. The number of arbitrators appointed is not, in the opinion of the speaker, a very important matter; the essential thing is that each party appoint an equal number of arbitrators.

In consequence, he proposes to modify Article 24 in the following manner:

1. Each party shall appoint an equal number of arbitrators.
2. No national judge shall be appointed in case the tribunal should be composed of only three members.

It is understood, of course, that the parties will be free to depart from this rule by special agreement.

The speaker admits national judges for those cases coming within summary procedure. This procedure, contrary to that dealt with in Article 24, is intended to adjust disputes more of a technical than of a juridical nature; it admits neither counter-cases, replies nor debates. National arbitrators are clearly indicated in this system for the purpose of supplying necessary explanations for the equitable unfolding and settlement of the case.

The **President** states that in view of the fact that the proposition of Mr. HEINRICH LAMMASCH confines itself to stating that the parties shall each appoint *an equal number of arbitrators,* it does not meet the need of establishing exact rules for the constitution of the tribunal through the immediate application of the Convention, in case the parties should, to that end, have recourse to the Convention itself.

Mr. **Fromageot** thinks that the second proposition of Mr. HEINRICH LAMMASCH, which tends to exclude national judges in case the arbitral tribunal should be composed of only three members, would establish a rather rigorous system. It seems preferable to him to leave it to the parties to settle this matter. In certain cases the presence of a national arbitrator is indispensable. As a rule, the alien arbitrator will but imperfectly grasp a matter affecting national interests.

Mr. **Kriege** concurs in the view expressed by Mr. HEINRICH LAMMASCH. The parties have at their disposal agents, advocates, etc., to meet any of the difficulties to which Mr. FROMAGEOT has just alluded.

Mr. **Fromageot** adds that it is not merely a matter of providing for explanations concerning the case itself, but also of obviating difficulties that might arise in connection with the execution of the decision within the territory of the particular State. A national arbitrator will meet this question with greater competence than a stranger.

[742] Mr. **Heinrich Lammasch** believes that the agents of the parties may, upon this matter, render just as good services as national judges. Moreover, the parties will always have the right to depart from this rule by special agreement.

The **President** asks Mr. HEINRICH LAMMASCH if he is willing to yield his first proposition: "Each party shall appoint an equal number of arbitrators." In his judgment, the tribunal composed of five members is the proper standard.

Mr. **Heinrich Lammasch** yields his first proposition; he admits that the tribunal composed of five members is the correct type, but he insists upon his second proposition, that is to say, of excluding in principle national judges, in case the tribunal should be composed of only three members.

Mr. **Eyre Crowe** is in favor of the view expressed by Mr. FROMAGEOT. And,

moreover, it will be necessary to consider the matter of procedure, because each country has its own system.

Thus, for instance, the British procedure differs from that in force in France. We must guard against arousing the susceptibility of the parties. In this respect national judges seem to him preferable to foreign judges.

The **President** states that the committee is agreed to accept the tribunal of five members as the proper standard. He consults the committee regarding the second proposition of Mr. Heinrich Lammasch. Shall the text of Article 24 be changed in the sense of that proposition?

His Excellency Baron **Guillaume** states that it does not seem to him desirable to fix a rule concerning the nationality of the judges.

It sometimes happens that a sovereign consents to designate the arbitrators. The action of the sovereign cannot be restricted.

As a result of a vote, the committee decides to leave the first four paragraphs of Article 24 intact.

The **President** reads paragraph 5, the discussion of which had been reserved by the committee at the time of the first reading of the Convention of 1899.

The President and the members of the committee enter into an exchange of views regarding the system to be followed if those two Powers cannot agree upon the choice of the umpire. Different systems are explained. It is proposed that each Power present two or three candidates taken from amongst the members of the permanent Hague Court; drawing of lots shall designate the umpire from amongst them.

Messrs. **Fromageot** and **Lange** remark that, in their judgment, it would be easier to find quickly four very competent judges than six; the list of the members of the court is not exclusively made up of jurisconsults.

The **President** remarks that six judges offer greater guarantees of impartiality than would four.

Mr. **Heinrich Lammasch** proposes that the States in dispute should choose instead of two candidates, three Powers, of which the drawing of lots should designate the one that appoints the umpire.

Mr. **Kriege** states that when the committee discusses Articles 31 *a* and 31 *b*, he will explain in detail a system which, in his judgment, offers all the guarantees of impartiality that can be desired. He gives an outline of this system of which the following are the preliminary data:

> Each party appoints an arbitrator and designates a Power; the two Powers thus designated choose in their turn the third and fourth arbi-
> [743] trators and in common agreement apply to a fifth Power, designated, if necessary, by lot drawing, to choose the fifth member of the tribunal by an absolute majority of votes of the members chosen by the non-interested parties.

As the result of a vote, the committee accepts the system according to which the parties which may have been unable to agree, are each to designate a Power for the selection of the umpire, instead of their presenting the candidates directly themselves.

The **President** reads the following text proposed by Mr. Lange and to be added after paragraph 5:

If, finally, within two months' time these two Powers cannot come to an agreement on the choice of the umpire, each of them designates two candidates in the general list of the members of the arbitration Court, and lot drawing shall decide which of the four persons thus designated shall be the umpire.

After a short discussion, the period of two months and the number of two candidates proposed by Mr. LANGE are accepted by the committee.

ARTICLE 25

The tribunal of arbitration sits ordinarily at The Hague.

Except in cases of necessity, the place of session can only be altered by the tribunal with the assent of the parties.

This article had been suppressed by the committee at the time of the first reading of the Convention of 1899, as being a duplicate of Article 36.

Finding Article 24 too long, the committee decides to constitute an Article 25 of the three last paragraphs of the preceding article, beginning with the words: "The tribunal being thus composed."

At the suggestion of Mr. **Cecil Hurst** the committee decides to place a new paragraph at the beginning of Article 22:

"*The Permanent Court has its seat at The Hague,*" and to modify as follows, paragraph 2 of the same article: "*An International Bureau serves as registry for the Court.*"

ARTICLE 26

The International Bureau at The Hague is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers, or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

(*No remarks.*)

ARTICLE 27

The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

[744] The Peruvian and Chilean propositions concerning Article 26 are referred to committee A.

ARTICLE 28

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It *shall address* to them an annual report on the labors of the Court, the working of the administration and the expenditure *as well as a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 22, last paragraph.*

Paragraph 1 is reserved for the drafting committee.

Having reached paragraph 8, the committee decides to fix at nine instead of five, the number of members whose presence shall permit the Administrative Council of the Hague Permanent Court validly to deliberate.

ARTICLE 29

The expenses of the Bureau shall be borne by the signatory *or adhering* Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date of their adhesion.

(*No remarks.*)

The meeting closes at 7 o'clock.

[745]

SEVENTH MEETING

SEPTEMBER 9, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 9:15 o'clock.

The program of the day calls for the examination in second reading of Articles 30 and following of the Convention of 1899.

ARTICLE 30

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules, which shall be applicable to arbitration procedure, unless other rules have been agreed on by the parties.

(*No remarks.*)

ARTICLE 31

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are clearly defined the subject of the dispute and the extent of the arbitrators' powers. This act implies an engagement of the parties to submit in good faith to the arbitral award.

After an exchange of views, the committee decides to suppress, as useless, the word "clearly" from the text of this article.

The **President** reads the text of the said article as he has drafted it on the basis of the deliberations of the committee:

> The Powers which have recourse to arbitration sign a special act (*compromis*) in which are defined the subject of the dispute, the extent of the powers of the arbitrators, the form and time in which the communication referred to in Article 39 of the present Convention must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.
>
> The *compromis* shall likewise define, if there is occasion, the manner of appointing arbitrators, where the tribunal shall meet with the assent of the State upon whose territory it is to meet, the language it shall use and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

[746] The *compromis* implies an engagement of the parties to submit in good faith to the arbitral award.

His Excellency Sir **Edward Fry** thinks that the *compromis* should settle only matters coming exclusively within its competence, such as the subject of the dispute, and the extent of the arbitrators' powers. He proposes to relieve it of

the obligation to determine the form and the periods in which the communication contemplated by Article 39 shall be made.

Mr. **Kriege** replies by stating that the committee had already decided to leave it for the *compromis* to settle the matter of form and periods. Nevertheless, the possibility is foreseen of extending the periods, either by mutual agreement between the parties or by a decision of the tribunal. This decision of the committee should not be reversed.

The **President** and Mr. **Heinrich Lammasch** approve of the opinion expressed by Mr. KRIEGE.

As a result of the discussions of the text of Article 31 as it would appear following the deliberations of the preceding sittings, the committee decides to omit paragraph 2 from the text and to incorporate in Article 36 the words "*with the consent of the State within whose territory the tribunal is to sit.*"

Upon the proposition of the **President,** the committee decides, furthermore, to strike from the text of paragraph 1 the words: "*the extent of the arbitrators' powers,*" and to insert, upon the proposition of Mr. **Fromageot,** into the text of paragraph 2, after "the *compromis* shall also define, if necessary," the words: "*the manner of appointing the arbitrators, their eventual special powers.*"

The **President** reads Article 23 of the Russian propositions:[1]

> The litigant Powers which have agreed to submit their dispute to the Permanent Court of Arbitration agree to communicate this act immediately after the signature of the *compromis* to the International Bureau, asking the latter to take the necessary measures for the establishment of the arbitral tribunal.
>
> After the choice of the arbitrators these same Powers shall communicate their names without delay to the International Bureau which, for its part, is obliged to communicate without delay to the arbitrators named the *compromis* which has been signed and the names of the members of the arbitral tribunal which has been established.

As the result of an exchange of views, the committee decides not to accept this article and to modify Article 25 as follows:

> The tribunal being composed as has been stated in the preceding article, the parties notify to the Bureau, as soon as possible, their determination to have recourse to the court, and the names of the arbitrators. The Bureau communicates without delay, to each arbitrator, the *compromis* and the names of the other members of the tribunal.
>
> The arbitral tribunal assembles on the date fixed by the parties.
>
> The members of the tribunal in the performance of their duties and out of their own country, enjoy diplomatic privileges and immunities.

The meeting closes at 10:15 o'clock.

[1] Annex 10.

[747]

EIGHTH MEETING

SEPTEMBER 9, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 4:30 o'clock.

His Excellency Baron **Guillaume** communicates a semi-official letter which he received from the Secretary of the Permanent Court of Arbitration. It is desired to ascertain if the rule adopted in Article 29 of the Convention of 1899 anent the pacific settlement of international disputes, and according to which "the expenses of the International Bureau to be met by the signatory Powers shall be reckoned from the date of their signature," is also applicable to the adhering Powers beginning with the date of their adhesion.

After an exchange of views, the committee decides to retain the phraseology adopted in a previous meeting which settles the matter in the affirmative.

His Excellency Mr. **Alberto d'Oliveira** asks to be permitted to take up once more Article 28. He proposes to make of the last clause at the end of the sentence of the last paragraph of this article, a new sentence beginning with the words: "*The report shall likewise contain a résumé of what is important. . . .*" (*Approval.*)

The committee takes up the discussion of the German proposition (Articles 31 *a*, 31 *b* and 34 *a*).[1]

ARTICLE 31 *a*

If certain signatory Powers have agreed among themselves upon obligatory arbitration which contemplates a *compromis* for each dispute, each of them shall, in default of contrary stipulations, resort to the intervention of the Permanent Court of Arbitration at The Hague, with a view to establishing such a *compromis* in case it has not succeeded in bringing about an agreement upon this subject.

Such recourse will not take place, if the other Power declares that in its opinion the dispute is not included within the category of questions to be submitted to obligatory arbitration.

[748]

ARTICLE 31 *b*

In case of resort to the Permanent Court at The Hague (see Article 31 *a*) the *compromis* shall be settled by a commission composed of five members designated in the following manner:

During the four weeks which follow the recourse, each of the two parties shall select one of the members of the Permanent Court, and also approach one of the disinterested Powers so that the latter may, in its turn, choose another member within the four remaining weeks, from among the members of the Permanent Court who have been appointed by it. Within a further period of four weeks the two disinterested Powers shall jointly

[1] Annex 8.

approach a third disinterested Power, which shall be designated, if necessary, by lot, so that it may choose, within the four following weeks, the fifth member from among the members of the Permanent Court which were named by it.

The commission shall elect its president by an absolute majority of votes among the members chosen by the disinterested Powers. If it is necessary, they shall cast ballots.

ARTICLE 34 *a*

In case of the establishment of a *compromis* by a commission, such as is provided for in Articles 31 *a* and 31 *b*, the members of the commission chosen by the three disinterested Powers shall form the arbitral tribunal.

Mr. **Kriege**: The main provisions of Articles 31 *a* and *b* and 34 *a* proposed by the German delegation were inserted by it into the draft convention relative to the establishment of an International Court of Justice. They figure in the third edition of this project under Article 22, No. 2. According to this article, the special delegation constituted within the court shall be competent to settle the *compromis,* if the request therefor is made by *one* of the parties, in those cases dealing with a dispute coming within the general arbitration treaty concluded or renewed after the coming into force of the convention, and which provides for a *compromis* in each dispute. However, recourse to the court will not take place if the other party declares that in its judgment the dispute does not belong to the class of questions to be submitted to obligatory arbitration, or if the arbitration treaty explicitly or implicitly excludes the intervention of the court for settling the matter of the *compromis.*

This provision has been adopted by committee of examination B. Nevertheless, the fact that it might also meet with the approval of the Conference would not make superfluous the articles referred to above and which we proposed for insertion in that chapter of the Convention of 1899 dealing with arbitral procedure. For the provision of the project dealing with the International Court of Justice contemplates only general arbitration treaties which shall be concluded or renewed after the establishment of the court. It would, moreover, be obligatory only for the Powers that might have signed the Convention concerning the International Court of Justice. In order to insure the general application of the principle enunciated in existing treaties, and animating the entire community of States, we believe it necessary to insist upon our original proposition.

In the meeting of the subcommission which took place on August 13, we had the honor to explain the reasons that have inspired it. Subsequently, the proposition became the subject of an address by Baron MARSCHALL in committee B. I do not desire to take any of your time by repeating that which has already been said. I believe, however, that you will permit me to state once more the great importance we attach to the principle of the "obligatory *compromis.*"

On the one hand, it is desired that there be placed at the disposal of Powers
[749] in dispute, which, animated by an equal good-will, find it difficult to agree with regard to the contents of the *compromis,* a practical and efficacious means to that end. It is true that in order to attain that goal, it would suffice to create a procedure applicable only in case the two opponents agree to have recourse to it. But there is more to it. It may well be that in spite of itself the Government may have some hesitation in fulfilling the obliga-

tion it has taken upon itself to submit a dispute to arbitration, either because it fears an unfavorable decision, or because it considers it repugnant to have its manner of procedure examined by an arbitration tribunal.

In view of such cases, it is necessary to find a means to ensure respect for the primordial rule of the law of nations "*pacta sunt servanda.*" We believe that this means is indicated in our proposition. We believe that its acceptance by the Conference would be a contribution of use in consolidating and extending confidence in the execution of obligations which form the basis of international law no less than of private law. We desire to have the Conference give proof of its devotion to the idea of obligatory arbitration by filling in a gap which till now has left in doubt the force of the *juris vinculum* deriving from obligatory arbitration treaties.

Mr. **Eyre Crowe** states again the objections which the principle of the German proposition has already encountered on the part of the British delegation in committee B. It will be impossible for his Government to accept this proposition. Moreover, it does not agree with the fundamental principle of Chapter III of Part IV of the Convention of 1899 which gives entire freedom to the parties to organize by mutual agreement all that which concerns the *compromis* and arbitral procedure.

Finally, Mr. Eyre Crowe considers the proposition superfluous, in view of the fact that Article 31 gives to the parties the right to leave to the arbitrators themselves the settlement of the *compromis*.

Mr. **Heinrich Lammasch** remarks that the German proposition infers that the parties have already renounced their freedom of action by signing an obligatory arbitration treaty. Reference in it is made only to the *execution* of an obligatory arbitration treaty already concluded.

Mr. **Kriege** concurs in the explanations furnished by Mr. Heinrich Lammasch.

Mr. **Fromageot** thinks that Articles 31 *a* and 31 *b* should be placed after Articles 16 to 19 which deal with obligatory arbitration.

Mr. **Kriege** does not concur in this opinion. He thinks that it is proper to include in this chapter all that which relates to the matter of the *compromis*. Articles 31 *a* and 31 *b* are, therefore, in their proper place.

His Excellency Mr. **Alberto d'Oliveira** reminds the members that in the obligatory arbitration convention, which the committee is now engaged in drafting, there is one article (Article 3 of the American project) which deals with the *compromis*. It seems as if this matter should be reserved.

The **President** thinks that the disagreement results from an erroneous manner of considering the *compromis* in relation with a pre-existing general arbitration treaty. In such case, it is the treaty which establishes the juridical bond; the *compromis* is but the execution of an obligation already entered into; we are not now dealing with a Convention to be concluded but with a procedure which is to be followed. The most important part to be defined in the *compromis* is the *subject of the dispute*. If the parties cannot reach an agreement upon this matter, the arbitrators themselves (if the arbitration treaty regulates the manner of their appointment) must judge *upon the basis of the reciprocal claims of the parties*. This is what happens in the ordinary administration of justice, and it was the method adopted for the first time by Italy in her treaty with Argentina in 1898, and reproduced in her subsequent treaties with Peru and

[750] with Denmark. If the treaty itself does not provide for the appointment of the arbitrators, the text of the *compromis* must be entrusted to a special commission; and this is in fact the purpose of the German proposition, which constitutes, in this respect, real progress by always insuring the execution of an obligatory arbitration treaty.

His Excellency Mr. **Alberto d'Oliveira** thinks that the commission is especially concerned with a matter of procedure. But, in his opinion, a distinction is necessary. He has not the slightest doubt that for obligatory arbitration treaties without any reservation whatever, the obligatory *compromis* will mark a real step in advance. But he questions whether the application of the clause of Article 31 *a* to treaties containing the customary reservations of honor and essential interests would not, instead of facilitating the extension of arbitration, be an obstacle thereto.

His Excellency Mr. D'OLIVEIRA explains his position as follows: This or that State, having concluded an obligatory arbitration treaty with reservations, would, no doubt, more frequently and even in good faith invoke these reservations at any time it might have reason to fear the establishment, without its consent, of a *compromis* that might not sufficiently take into account the interests it desires to safeguard.

Mr. **Heinrich Lammasch** considers successively the two kinds of objections that have been set forth against the German proposition. According to Mr. CROWE, the *compromis* is more than an act of procedure; it forms a real new treaty. If this point of view were accepted, obligatory arbitration treaties would be nothing more than mere *pacta de contrahendo,* promises of concluding the real obligatory arbitration treaties, that is to say, the *compromis.*

The other objection, the one offered by his Excellency Mr. D'OLIVEIRA, is of a rather practical nature. Mr. HEINRICH LAMMASCH believes that the reservations contained in certain arbitration treaties must not be extended by an arbitrary application: the States may always invoke them when their essential interests are at stake; but in such case they must do so openly, they must have the courage of their conviction and not avoid arbitration by refusing to sign the *compromis.*

Mr. **Eyre Crowe** repeats that, in his judgment, the commission is not dealing with a matter of procedure and that the *compromis* is more than the mere execution of an arbitration treaty.

According to Article 31, the *compromis* must state the subject of the dispute, and this is one of the most important matters.

Mr. EYRE CROWE proposes to return to the phraseology adopted by committee B for the project of the Permanent Court.

Mr. **Kriege** replies by stating that the extent of the obligation assumed by the contractants should be clearly defined in the arbitration treaty itself, so as to avoid as much as possible leaving doubtful questions to be settled by the *compromis.*

The decision taken by committee B cannot influence the decision of committee C. In the article adopted by committee B it had been especially assumed that the parties have no direct influence upon the constitution of the special delegation. It is for this reason that committee B did not desire to recognize the competence of this delegation with regard to treaties they might have concluded previously. In this case, on the contrary, it is the parties themselves

who make the choice of persons who are to form the commission. There is, therefore, no reason to distinguish between existing treaties and those to be concluded in the future.

His Excellency Mr. **Alberto d'Oliveira** observes that sometimes the manner in which the *compromis* is settled is of the greatest importance, and in this connection he refers to the treaty of Washington of 1871 in the *Alabama* case.

[751] Mr. **Kriege** thinks that the objection of his Excellency Mr. D'OLIVEIRA might be applied both to arbitration treaties without reservations and those with reservations.

In the former case the States might also fear to leave to the arbitrators, by authorizing them to settle the *compromis,* the right of eventually deciding the question of ascertaining the exact scope of the treaty.

But Mr. KRIEGE thinks that if the introduction of the obligatory *compromis* in arbitration treaties will result in making the States more cautious as to their elaboration, this would be a further argument in favor of the German proposition.

His Excellency Mr. **Alberto d'Oliveira,** in answer to the remarks of Mr. KRIEGE, states that the reservations of honor and of essential interests are very broad, whilst, on the contrary, *really* obligatory arbitration treaties, as for instance, the one which committee A is now occupied in drafting, clearly specify the matters for which the States are willing to renounce any reservation. In these circumstances, the *compromis* is of only secondary interest to them, and it can hardly be seen why in settling it they should entertain fears which they do not evidence in signing the treaties in question.

A discussion is now entered into by the committee as to the manner in which the principle of the obligatory *compromis* will be put to a vote.

His Excellency Mr. **Alberto d'Oliveira** insists upon the distinction he has drawn between obligatory arbitration treaties with or without reservations.

On the other hand, Mr. **James Brown Scott** would have the committee decide that the clause of the obligatory *compromis* should be applicable only to treaties to be concluded, and in no way refer to treaties that are concluded already.

Mr. **Heinrich Lammasch** is of opinion that Article 31 *a* contains in principle nothing but the development of that which forms the very essence of a treaty by which the States bind themselves to submit certain matters to arbitration. But, being of a purely interpretative nature, this provision might indeed have retroactive force; nevertheless, and in view of the objections that have been made by several Powers, he will vote against the application of this provision to treaties already existing, and desires to restrict the application to future treaties.

The **President** puts the broader formula to a vote: the application in principle of the obligatory *compromis* to all obligatory arbitration treaties with or without reservations, already concluded or to be concluded.

Voting for, 3: Germany, Austria-Hungary, Italy.

Voting against, 4: Belgium, United States of America, France and Great Britain.

Abstaining: Portugal.

Despite this vote, the committee decides to reserve the final vote on the German proposition, and await the result of the labors of committee B, charged

with the drafting of a project for the institution of a Court of Arbitral Justice.

Article 32 is then taken up.

ARTICLE 32

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present act.

[752] Failing the composition of the tribunal by direct agreement of the parties, the course *referred to in Article 24* is pursued.

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

Mr. **Kriege** asks if the words *"direct agreement"* in the second paragraph would not be happily replaced by the word *"compromis."*

After an exchange of views in regard to this matter, the committee decides to suppress the qualifying word *"direct"* and to leave only the word *"agreement."*

It is decided that similar action be taken with regard to Article 24.

In order to make Article 32 clearer and more complete, it is further decided to add therein after the words "under Article 24" mention of paragraphs 3 to 6.

Articles 33 to 36 give rise to no remark.

ARTICLE 33

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 34

The umpire is *ex officio* president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 35

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

ARTICLE 36

Failing selection *by the parties,* the tribunal sits at The Hague.

The place of meeting *once fixed can not be altered by the tribunal, without* the assent of the parties.

ARTICLE 37

The parties are entitled to appoint delegates or special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defence of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 38

If the question as to what languages are to be used has not been settled by the compromis, it shall be decided by the tribunal.

[753] Upon a remark of Mr. **Kriege** the committee decides to place Article 38 before Article 37, in order to group, as much as possible, all the provisions relating to the *compromis*.

With regard to the third paragraph of Article 37, Mr. **James Brown Scott** tells the committee that the delegation from the United States of America greatly desires that the members of the court be forbidden to plead before it in the rôle of advocate. It believes that these two functions are incompatible and that their combination in one and the same person would have a most harmful effect upon the institution itself.

The **President** observes that the provision contained in paragraph 3 of Article 37 marks already a notable advance in the direction indicated by Mr. SCOTT.

He thinks that the adoption of the proposition of the delegation from the United States of America would have as a consequence that the Governments would not place upon the list of the members of the court the names of persons whose eventual assistance they might desire to reserve.

Mr. **Eyre Crowe** states that the British delegation reserves the decision it is to take upon this matter until after it shall have received the new instructions it has requested.

Mr. **Heinrich Lammasch** concurs in the view expressed by Mr. SCOTT. He thinks also that the mentality of a lawyer is or must readily become different from that of a judge and can be but harmful to the court.

The **President** remarks that the matter does not merely concern advocates but also the agents of the parties.

Mr. **Kriege** believes that certain Powers will not want to do without persons whom they have appointed members of the court as agents or advocates in their disputes, in view of the fact that they are their best available lawyers.

Mr. **James Brown Scott** repeats that he thinks that the presence in the court of judges who have exercised the functions of advocate, seems to him dangerous. On the other hand, he calls attention to the fact that certain parties may easily avail themselves in the court of judges favorable to their cause by calling upon persons who have, as lawyers, defended this or that principle.

His Excellency Baron **Guillaume** pleads for the freedom of the parties to be represented by those of their nationals whom they desire. In this connection he sets forth how very rigorous would be the provision proposed by the United States for his Government which, in a spirit of perfect impartiality, has included in several of its treaties the rule that only one of its nationals should be a member of the court in the judgment of a case in which it might be a litigant party.

Mr. **Heinrich Lammasch** calls the attention of the committee to the fact that it is a delicate matter for a judge to plead as advocate before his colleagues.

He adds that, although to his mind the members of the court will be little influenced by the bonds of confraternity, it is, nevertheless, important to obviate any suspicion.

Mr. **Kriege** would concur in the view-point expressed by Mr. SCOTT, if he

were considering a really permanent court, sitting through a part of the year. But in this case we are dealing only with a list of judges, including hundreds of persons who will never sit; the danger does not, therefore, seem very great.

The proposition of Mr. JAMES BROWN SCOTT is put to a vote and defeated by 5 votes against 1.

The meeting closes.

[754]

NINTH MEETING

SEPTEMBER 11, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 2: 30 o'clock.

The program of the day calls for a discussion upon second reading of Articles 39 and following of the Convention of 1899.

ARTICLE 39

As a general rule arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents, *directly or through the medium of the International Bureau, to the members of the tribunal and the opposite party, of the cases, counter-cases and replies, of all printed or written acts and of all documents containing the grounds relied on in the case. This communication shall be made in the form and within the time fixed by the compromis.*

The time fixed by the compromis may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

Mr. **Fromageot** takes the floor to read aloud a new phraseology of this article which he has drafted in accordance with the desires of the committee.

As a general rule arbitration procedure comprises two distinct phases: written pleadings and the oral discussions.

The written pleadings consist in the deposit and exchange of cases, counter-cases, and, if necessary, replies, the order and the time of which are fixed by the *compromis*, and if they are not fixed in the *compromis*, then by the tribunal. The parties add thereto every act and document relied on in the case.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

[755] Several remarks are presented anent the proposed text.

Whilst some members think that it would be useful to include here *expressis verbis* that the deposit may be made directly or through the International Bureau, others, on the contrary, feel that a simple explanatory note joined to the minutes will suffice to show that this deposit may be made either way, directly or indirectly, at the pleasure of the parties. Article 38 sufficiently indicates that the communications of papers may be made through the agents, representatives of the parties.

The term "deposit" likewise causes certain apprehensions within the committee.

Mr. **Kriege** remarks that the expression employed at the beginning of the second paragraph would not be clear to persons not versed in the purely juridical expressions of the French language, and he proposes to retain in Article 39 the words: "communication by the agents," to which we have become accustomed since 1899, and which has led to no doubt in the minds of the jurisconsults.

After an exchange of views participated in by Mr. **Kriege,** the **President,** and his Excellency Baron **Guillaume,** the article is adopted in the following form:

> As a general rule, arbitration procedure comprises two distinct phases: written pleadings and oral discussions.
>
> The written pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case.
>
> This communication is made either directly or through the intermediary of the International Bureau, in the form, the order, and within the time fixed by the *compromis.*
>
> The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.
>
> The discussions consist in the oral development before the tribunal of the arguments of the parties.

ARTICLE 40

Every document produced by one party must be communicated to the other party in the form of a duly certified copy.

(*No remarks.*)

ARTICLE 40 *a* OF THE GERMAN PROPOSITION [1]

The tribunal shall meet only after the close of the pleadings.

Mr. **Fromageot** objects to the principle of this article. He believes that it would be very dangerous to stipulate in an absolute way that the tribunal may never meet before the close of the pleadings. It is proper to leave sufficient elasticity to this article in order that the good administration of justice may not be interfered with. For it may happen, and in fact it has already happened, especially in the Fisheries Arbitration, in which his Excellency Mr. ASSER took part, that a question of procedure suddenly assumes a capital importance and that it must be settled by the tribunal itself. The pleadings may further require at a certain moment the testimony of certain witnesses, and the constitution of a commission of inquiry. Shall we take the risk of creating, with regard to these cases, the greatest kind of difficulties for the parties?

Mr. FROMAGEOT concludes by calling for the absolute suppression of Article 40 *a.*

[756] Mr. **Kriege** acknowledges that these remarks are well founded. Nevertheless, he thinks that there would be an advantage in establishing at least the principle that the tribunal is not to meet until after the close of the pleadings.

[1] Annex 12.

After a short discussion the phraseology of Article 40 *a* is adopted in the following form:

> Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

ARTICLE 41

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes alone have an authentic character.

The **President** proposes to provide that the minutes shall be signed by the president and the registrar.

This proposition is adopted; nevertheless, upon the suggestion of Mr. **Kriege**, the words " one of the secretaries " are substituted in place of the word " registrar."

The committee feels indeed that it may happen that an arbitral tribunal may have no registrar; it thinks, moreover, that even in the contrary case, the signature of the president accompanied by that of the secretary who has drafted the minutes must be sufficient to give authenticity to the latter.

The third paragraph of Article 41 is, therefore, phrased as follows:

> They are recorded in minutes drawn up by the secretaries appointed by the president. The minutes are signed by the president and one of the secretaries; and alone have an authentic character. Articles 42 to 49 are adopted without any observations.

ARTICLE 42

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party

ARTICLE 43

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 44

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal, the tribunal takes note of it.

ARTICLE 45

The agents and counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defence of their case.

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ARTICLE 46

They are entitled to raise objections and points. The decisions of the tribunal on these points are final, and cannot form the subject of any subsequent discussion.

ARTICLE 47

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions can be regarded as an expression of opinion by the tribunal in general, or by its members in particular.

ARTICLE 48

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of law.

ARTICLE 49

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms and time in which each party must conclude its *final* arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 49 *a*

With regard to all the notifications to be made, especially to the parties, to the witnesses and to the experts, the tribunal may apply directly to the Government of the Power within whose territory the notification must be effected. A similar course shall be pursued for the purpose of securing any means of proof.

The requests addressed to that effect may not be refused except in case the requested Power deems them of such a nature as would affect its sovereignty or its security. If the request is complied with, the expenses shall include only the expenses of execution really incurred.

The tribunal has also the right to resort to the medium of the Power within whose territory it has its seat.

With regard to the second part of the second paragraph of Article 49 *a*, Mr. **Kriege** states that it is lacking in the corresponding article dealing with the commissions of inquiry. It would perhaps be appropriate to complete Article 24 in this sense, or if preferred, to suppress in Article 49 *a* the provision under discussion; Mr. KRIEGE would see no inconvenience in this. It would be desirable to make the two articles uniform.

Mr. **Heinrich Lammasch** calls the attention of the committee to Articles 23 and 24 of the draft Convention for the pacific settlement of international disputes. These provisions contain rules similar to that of Article 49 *a;* Article 23 with regard to the Powers in dispute, and Article 24 with regard to the third Powers. It may perhaps be asked later on why these are not the same rules as those given in the part dealing with the commissions of inquiry,
[758] and in the chapter dealing with arbitral procedure, disregarding the differences made necessary by the diversity of procedure.

After an exchange of views in which his Excellency Baron **Guillaume**, Mr. **Kriege** and the **President** take part, the committee decides to replace Article 49 *a* with two articles of the same tenor as that of Articles 23 and 24 relative to the commissions of inquiry.

Instead of the expression *"all means and facilities necessary"* in the first paragraph of Article 23, the committee decides to put the words *"all means necessary"* which will be more exact from the juridical point of view, and also to substitute the expression: *"for the decision of the dispute"* for the expression *"to enable it to become completely acquainted with and to accurately understand the facts in question"* as being more appropriate to the subject of arbitral procedure.

In consequence of a remark by his Excellency Mr. **Alberto d'Oliveira** concerning the restrictions of a different scope found in paragraphs 1 and 2 of Article 23, this second paragraph is suppressed.

ARTICLE 50

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case, the president pronounces the discussion closed.

(*No remarks.*)

ARTICLE 51

The deliberations of the tribunal take place in private.
Every decision is taken by a majority of members of the tribunal.
The refusal of a member to vote must be recorded in the minutes.

ARTICLE 52

The award, given by a majority of votes, must state the reasons on which it is based. It is drawn up in writing and signed by *the president and by the registrar.*

Upon a motion of Mr. **Kriege** the committee decides to follow the course proposed with regard to the Court of Arbitral Justice,[1] and to add to the first paragraph of Article 51 the words: "*and remain secret.*"

After a short exchange of views between Messrs. **Heinrich Lammasch, Eyre Crowe, Kriege** and the **President,** the committee, also in conformity with the similar provisions dealing with the Court of Arbitral Justice, decides to suppress the third paragraph of Article 51 and to have the second sentence of the first paragraph of Article 52 read as follows:

> It contains the names of the arbitrators and is signed by the president and by the registrar or the secretary acting as registrar.

Articles 53, 54 and 54 *a* are adopted without remarks.

ARTICLE 53

The award is read out at a public meeting of the tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

ARTICLE 54

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitely and without appeal.

[759] ARTICLE 54 *a*

Any dispute which might arise between the parties concerning the interpretation and the execution of the arbitral decision, will, provided the compromis does not exclude it, be submitted to the judgment of the same tribunal that has rendered it.[2]

ARTICLE 55

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence

[1] Article 30.
[2] Annex 14.

upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

The **President** wishes to know if it would be appropriate to insert into Article 55 a clause stating that the demand for revision might be made only as long as the decision itself had not been carried out.

Mr. **Eyre Crowe** calls attention to the fact that frequently, and especially in the case when the execution of the sentence would consist in the payment of a sum of money, a party might desire to pay in the first place and afterwards demand the revision.

Mr. **Fromageot** states that in such case payment might be made under the reservation of revision.

Mr. **Heinrich Lammasch** feels that it would be prudent and preferable not to change Article 55 in view of the fact that this provision constitutes, so to say, a compromise of a large number of differing opinions. (*Approval.*)

ARTICLE 56

The award is binding only on the parties who concluded the *compromis*.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter notify to the former the *compromis* they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

The **President,** in view of the text which has already been adopted by committee A, proposes to have the first paragraph of Article 56 read "*the parties in dispute*" instead of "*the parties who concluded the compromis,*" and to substitute in paragraph 2 for the words "*notify to the former the compromis they have concluded*" the words: "*inform all the signatory Powers in good time.*"

Article 56 thus modified is adopted.

Articles 57 to 61 inclusive are adopted without remarks.

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ARTICLE 57

Each party pays its own expenses and an equal share of the expenses of the tribunal.

General provisions

ARTICLE 58

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers that were represented at the International Peace Conference at The Hague.

ARTICLE 59

Non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known

their adhesion to the contracting Powers by a written notification addressed to the Netherland Government, and communicated by it to all the other contracting Powers.

ARTICLE 60

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 61

In the event of one of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals thereto.

Done at The Hague, July 29, 1899, in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

With regard to the French proposition containing the draft of a plan to supplement the Convention of 1899,[1] Mr. **Fromageot** proposes to insert it into the said treaty as Chapter IV entitled "*summary procedure.*" Article 1 of the French proposition would thus become 57 *a*, etc. (*Approval.*)

Mr. **Fromageot** and Mr. **Kriege** submit propositions for a new text of Article 1, phraseology of which was reserved at the time of the first reading.

[761] After an exchange of views, Messrs. **Heinrich Lammasch, Fromageot** and **Kriege** submit the following phraseology to the committee:

> With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules: For lack of provisions contained in the present chapter or adopted by the parties, the articles of Chapter III remain applicable.

Instead of the last clause they propose to read in case it is deemed preferable by the committee, in continuing the first clause:

> which would be applicable, in the absence of different provisions and subject to the reservation that the provisions of Chapter III apply so far as may be.

The committee postpones to a subsequent meeting the final decision in regard to this matter.

The committee decides to introduce into the first paragraph of Article 2 a modified phraseology proposed by Mr. **Kriege,** which has become necessary in consequence of the insertion of the French proposition into the Convention itself, and agrees to the suppression of Articles 3, 6, 7 and 8 which have become superfluous as a result of the incorporation of the said proposition in a treaty of which other articles already contain the same provisions.

The meeting closes at 5: 30 o'clock.

[1] Annex 9. See annex to the minutes of the eleventh meeting of the committee of examination C of the first subcommission of the Second Commission.

[762]

TENTH MEETING

SEPTEMBER 14, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 10 o'clock.

The minutes of the sixth and seventh meetings are adopted.

The **President** requests the committee to examine the few articles of the provisional text of the Convention of 1899 and of the draft of a supplementary plan of the French delegation, the discussion of which had been reserved. At the same time, the members of the committee are invited to submit their remarks upon the entire text.

Mr. **Kriege** states that he has but just received the fourth proof of this text; in consequence, it will not yet be possible for him to declare himself upon this matter.

The **President** states that the members of the committee who after the meeting might still desire to submit remarks with regard to the form of the text may subsequently come to an understanding with the President with regard to the changes desired by them in the phraseology of the articles of the Convention.

The PRESIDENT reads Article 23.

ARTICLE 23

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

[763] The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed.

This appointment is made for a fresh period of six years.

The paragraph before the last of this article is modified as follows: "*In case of the death or retirement of a member of the court, his place is filled in the same way as he was appointed, and for a fresh period of six years.*"

The last paragraph is eliminated.

The **President** reads Article 24.

ARTICLE 24

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form

the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by direct agreement of the parties, the following course is pursued:

Each party appoints two arbitrators, of whom only one can be its *ressortissant* or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members indicated by the parties in dispute and not *ressortissants* of either of them. Which of the candidates thus presented shall be umpire is determined by lot.

His Excellency Mr. **Alberto d'Oliveira** remarks that he was not present while the committee discussed the last paragraph of Article 24. In the interest of the impartiality of the arbitral tribunal he would prefer that the two Powers designated by the parties in dispute should each choose, from the list of the members of the Permanent Court, three candidates instead of two, from amongst whom drawing of lots shall designate the umpire. He believes it preferable that the candidates should not belong to the same nationality.

Mr. **Heinrich Lammasch** recalls that recently he had proposed the following system:

Instead of two candidates, the States in dispute shall designate three Powers from amongst which drawing of lots shall designate the one who is to designate the umpire. In his opinion, it would not be easy to find quickly from amongst the members of the Permanent Court six competent candidates.

His system seems to him to be more advantageous.

Mr. **Fromageot** states that this procedure might lead to difficulties in case the parties in dispute should each designate several Powers. It would [764] be less difficult to choose candidates from the list of the Permanent Court, the more so because the number of recorded members has been noticeably increased.

The **President** states that at first sight the project of Mr. Heinrich Lammasch would seem to be advantageous; but, in his opinion, the choice of the umpire might oftentimes bear a certain political character, if that project were adopted. It seems preferable to him, however, that the parties should each present three candidates instead of two, from amongst whom lot drawing shall designate the umpire.

Mr. **Kriege** would prefer the proposition of Mr. Heinrich Lammasch, but with this modification, that the States in dispute should choose only two Powers.

If this proposition were not adopted, it seems to him preferable to limit the number of candidates to two. It might at times be difficult for the parties to find three candidates who seem to them to combine all the qualities necessary to decide in the matter.

Mr. **James Brown Scott** approves of the present text of Article 24; he

thinks that it will not always be easy to find among the members entered upon the list of the Permanent Court six candidates of incontestable competence.

The speaker adds that it is important to make arbitration easy.

Mr. **Heinrich Lammasch** also desires that arbitration should be made readily accessible. He would not, however, facilitate a means of recourse to arbitration which he deems of little advantage. It would be his desire to establish a sort of constraint for the parties in dispute for immediately agreeing upon the choice of the umpire. In case his system, which calls for the intervention of three Powers, were not adopted, he would accept the system of "three candidates." But he hopes that, realizing that eventual drawing of lots is to decide between the three candidates presented by each of the parties, the Powers will come to a previous agreement regarding the choice of the umpire, a choice which, besides, may even be settled by the parties in the *compromis*.

Mr. **Fromageot** admits that the recourse in question must not be made too easy. In the interest of the progress of arbitration, it is, however, desirable not to complicate it.

The **President** states that in view of the fact that it seems difficult to find readily three competent candidates from amongst the members entered upon the list of the Permanent Court, it might perhaps be possible to modify the text of the last paragraph of Article 24 by inserting therein in the place of the words "presents two candidates taken from the list . . ." the words "presents three candidates taken preferably from the list . . ."

Mr. **James Brown Scott** requests the committee to act with regard to Article 24.

The **President** puts to a vote the amendment proposed by his Excellency Mr. D'OLIVEIRA which proposes to raise to three the number of candidates from amongst whom drawing of lots is to designate the umpire.

The result of the vote is three votes for and three votes against the proposition. Article 24 is retained in its present form.

The **President** reads Article 24 *a*.

ARTICLE 24 *a*

The tribunal being composed as has been stated in the preceding article, the parties notify to the Bureau, as soon as possible, their determination to have recourse to the Court, the text of the *compromis* and the names of the arbitrators.

[765] The Bureau communicates without delay to each arbitrator the *compromis* and the names of the other members of the tribunal.

The arbitral tribunal assembles on the date fixed by the parties.

The Bureau makes the necessary arrangements for the meeting.

The members of the tribunal in the performance of their duties and out of their own country enjoy diplomatic privileges and immunities.

Mr. **Heinrich Lammasch** believes that it would be well to restrict the provisions contained in paragraph 2 of this article for the reason that each arbitrator must know his colleagues and be acquainted with the *compromis* in order to proceed to the election of the umpire.

Mr. **Kriege** believes that it is better not to modify these provisions.

The article is adopted in its present form.

Mr. **Fromageot** finds that the observation "*Adopted.* (*Reference of the*

Chilean and Peruvian propositions to Committee A.)" is by error put next to Article 26, instead of beside Article 27.

The **President** reads Article 31 *a:*

ARTICLE 31 *a*

The Permanent Court is competent to settle the *compromis,* if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

2. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

The members of the committee now enter into an exchange of views concerning Articles 31 *a,* 31 *b* and 34 *a* of the German proposition.

His Excellency Baron **Guillaume** states his inability to admit that these articles are adopted by the committee only with regard to the hypothetical case when the project of the institution of a court of arbitral justice should be defeated by the Conference.

If the principle of the obligatory *compromis* is a sound one, it must be inserted in the Convention for the pacific settlement of international disputes and also in the constitutive rules of the new jurisdiction.

It has always been understood that the two institutions, the Permanent Court and the tribunal which is to be created—should be put on the same footing, and that the parties might address themselves impartially either to one or the other. It is important to uphold this principle and not to give to the tribunal attributes that might not also belong to the court.

[766] The speaker proposes, therefore, to insert the three articles of the German proposition under discussion into the Convention which the committee is to revise, unless their authors prefer to withdraw them.

His Excellency Mr. **Alberto d'Oliveira,** Mr. **James Brown Scott** and Mr. **Fromageot** concur in the opinion expressed by Baron GUILLAUME.

As the result of a vote, the committee decides to proceed to the discussion of Articles 31 *a,* 31 *b* and 34 *a* of the German proposition.

Messrs. **James Brown Scott** and **Fromageot** state that their delegations accept Article 31 *a.*

Upon the request of Mr. **Kriege,** the committee decides to eliminate from the text of No. 2 of this article, after the words *unless the treaty of arbitration* [*à moins que le traité d'arbitrage*] the word *ne.*

The committee also decides to invert the order of the two paragraphs of the said article. No. 2 shall take the place of No. 1, and vice versa.

Article 31 *a* is adopted with the above-mentioned modifications.

The **President** reads Article 31 *b*.

ARTICLE 31 *b*

In case of recourse to the Permanent Court, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 24, paragraphs 3 to 6.

The fifth member is *ex officio* president of the commission.

Upon the proposition of Mr. **Cecil Hurst,** the committee decides to insert in the text of paragraph 1 of this article, after the words "*in case of recourse to the Permanent Court*" the words "*in the case contemplated in the preceding article.*"

Article 31 *b* is adopted in its new phraseology.

The **President** reads Article 34 *a:*

ARTICLE 34 *a*

When the *compromis* is settled by a commission, as contemplated in Articles 31 *a* and 31 *b*, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

The committee decides to modify the text of this article as follows: instead of "*the commission itself* [*même*] *shall form,*" it shall read "*the commission itself* [*elle-même*] *shall form.*"

Article 34 is adopted.

The **President** reads Article 38:

ARTICLE 38

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defence of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

[767] Mr. **James Brown Scott** reserves the right to discuss later the last paragraph of this article.

Mr. **Cecil Hurst** states that the British delegation accepts this article.

Article 38 is adopted.

The **President** reads Article 49 *a:*

ARTICLE 49 *a*

The Powers in dispute undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute.

Mr. **Heinrich Lammasch** believes that in order to obviate any misunderstanding, it might perhaps be well to insert in the report that, while obligating themselves to furnish to the tribunal in the largest measure possible the necessary means for the decision of the dispute, the Powers in dispute on the one hand obligate themselves to use for this purpose the means at their disposal in

accordance with their domestic legislation, and on the other hand, assume in no way the obligation to act contrary to the domestic legislation of the State.

Their Excellencies Baron **Guillaume** and Mr. **Alberto d'Oliveira** do not concur in this view; they believe that it would not be useful to restrict through any commentary whatever, inserted in the report, the freedom assured to the Powers of judging *by themselves* of the possibility of furnishing to the tribunal the means in question.

Article 49 *a* is adopted without modifications.

The **President** reads Article 49 *b:*

ARTICLE 49 *b*

For all notifications which the tribunal has to make in the territory of a third Power signatory of the present Convention, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests cannot be rejected unless this Power considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

Mr. **Heinrich Lammasch** finds that there is a slight discordance between Article 49 *a* and paragraph 2 of Article 49 *b*.

His Excellency Mr. **Alberto d'Oliveira** believes that the two articles might be combined into one.

Mr. **Heinrich Lammasch** does not insist upon his suggestion.

Article 49 *b* is adopted.

The **President** reads Article 54 *a:*

ARTICLE 54 *a*

Any dispute arising between the parties as to the interpretation and execution of the arbitral award shall, provided the *compromis* does not exclude it, be submitted to the decision of the tribunal which pronounced it.

[768] Upon the proposition of Mr. **Fromageot**, the word "*same*" in the last line of the article is suppressed.

Article 54 *a* is adopted with this modification.

The **President** reads Article 57 *a:*

ARTICLE 57 *a*

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules, which shall be applicable in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be. When there are no provisions in the present chapter or settled upon by the Parties, the rules of Chapter III remain applicable.

The committee decides to replace in the text "*applicable*" by "*observed*" and "*other*" by "*special,*" and to eliminate the last sentence of the article: "*When there are no provisions, etc.*"

Thus modified, Article 57 *a* is adopted.

The meeting closes at 12 o'clock.

[769]

ELEVENTH MEETING

SEPTEMBER 19, 1907

His Excellency Mr. **Guido Fusinato** presiding.

The meeting opens at 9:30 o'clock.

The minutes of the eighth, ninth and tenth meetings are adopted.

The committee examines the fifth proof of the provisional text[1] of Article 20 and following of the Convention of 1899 and of the draft of a supplementary plan of the French delegation.

Mr. **Heinrich Lammasch** proposes to replace the word "*designated*" in the texts of paragraph 6 of Article 24 and of paragraph 1 of Article 57 *b*, by "*selected.*" (*Approval.*)

Mr. HEINRICH LAMMASCH would like to have it settled by whom and where the lot drawing referred to in the above-mentioned paragraph shall be effected. In his judgment, it would be well to have it recorded that the secretary-general of the Hague Permanent Court shall be appointed to carry out this lot drawing during a meeting of the Administrative Council held for that purpose.

The speaker asks if the committee regards it as advantageous to insert these indications in the text of Article 24, or if it deems it preferable to have mention made thereof in the report.

Mr. **Kriege** replies by stating that the second way seems to him more acceptable, for the reason that certain difficulties might be created in incorporating the indications in question into the text of Article 24. He observes that Article 32, which deals with special arbitration tribunals, contains a reference to Article 24; by inserting the indications in question into the text of Article 24, it would, therefore, be applicable to those cases in which it would be hardly available.

His Excellency Baron **Guillaume** approves of the opinion of Mr. KRIEGE. He states, moreover, that in case this clause is not made obligatory, the Powers will not conform to it because they are not interested in having effected in a distant country certain formalities that may be complied with within their territory.

As a result of an exchange of views, the committee decides to insert into the report that the drawing of lots may be effected through the International Bureau of the Hague Permanent Court.

[770] The **President** asks the committee if the period of two months referred to in paragraph 6 of Article 24 seems to it advisable, the more so because this period which, short even as it is, is only foreseen for the later phase of the procedure.

Mr. **James Brown Scott** believes that a period of two months is not at all

[1] See annex to these minutes.

too short. Moreover, it is a mere indication. The Powers may fix upon another period if they deem it necessary.

Mr. **Lange** states that the committee is dealing with an agreement to be established between two neutral Powers, and not between two parties in dispute which would be quite a different matter.

After a short discussion, the committee decides not to modify the matter of time.

Mr. **Lange** calls for the elimination of the words "*International*" and "*at The Hague*" in paragraph 5 of Article 22, and for the addition, on the other hand, of the word "*International*" to "*Bureau*" in paragraph 1, of Article 24 *a*. (*Approval.*)

Mr. **Heinrich Lammasch** proposes to omit the words "*at The Hague*" in the text of paragraph 1 of Article 26. (*Approval.*)

Mr. **Fromageot** proposes that the word "*suivantes*" in the text of Article 57 *a* be replaced by the word "*ci-après.*" (*Approval.*)

Mr. **Heinrich Lammasch** proposes to suppress the last paragraph of Article 31:

The compromis implies an engagement of the parties to submit in good faith to the arbitral award.

The speaker declares that this paragraph, being a duplicate of Article 18, seems superfluous.

After an exchange of views, the committee decides, as the result of a vote, to suppress the said paragraph as being a duplicate of Article 18 in which general reference is made to *arbitration convention,* without distinguishing between general and special conventions.

The committee adopts at the same time the suggestion of Mr. LANGE to express to the drafting committee the desire to suppress as well the provision of Article 18 and to add to Article 15 a second paragraph reading as follows: "*Recourse to arbitration implies an engagement to submit in good faith to the arbitral award.*"

Mr. **Heinrich Lammasch** explains that summary procedure should be resorted to only in case the two parties should prefer such procedure, and that, in consequence, it is important, to his mind, clearly to formulate the purely optional nature of this form of procedure.

He proposes, in consequence, to modify Article 57 *a* as follows:

> With a view to facilitating the working of the system of arbitration, the signatory Powers adopt for the disputes in their judgment admitting of a summary procedure, the following rules, which shall be observed in the absence of special stipulations, and subject to the reservation that the provisions of Chapter III apply so far as may be.

After an exchange of views and as the result of a vote, the committee, in view of the fact that the phraseology of Article 57 *a* is sufficiently clear, decides to retain the present text.

The meeting closes at 10:30 o'clock.

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Annex

PROVISIONAL TEXT OF ARTICLES 20 AND FOLLOWING OF THE CONVENTION OF 1899 AND OF THE DRAFT OF A SUPPLEMENTARY PLAN OF THE FRENCH DELEGATION, ADOPTED BY COMMITTEE C

PART IV.—INTERNATIONAL ARBITRATION

CHAPTER II.—*The Permanent Court of Arbitration*

ARTICLE 20

With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 22

The Permanent Court has its seat at The Hague.

An International Bureau serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the International Bureau at The Hague *as soon as possible* a duly certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They undertake likewise to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

ARTICLE 23

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

[772] Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed, *and for a fresh period of six years.*

Article 24

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

Failing the composition of the arbitration tribunal by agreement of the parties, the following course is pursued:

Each party *appoints two arbitrators, of whom one only can be its ressortissant or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators* together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers can not come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members designated by the parties in dispute and not ressortissants of either of them. Which of the condidates thus presented shall be umpire is determined by lot.

Article 24 *a*

The tribunal being composed *as has been stated in the preceding article,* the parties notify to the Bureau, *as soon as possible,* their determination to have recourse to the Court, *the text of the compromis* and the names of the arbitrators.

The Bureau likewise communicates without delay to each arbitrator the compromis, and the names of the other members of the tribunal.

The tribunal of arbitration assembles on the date fixed by the parties. *The Bureau makes the necessary arrangements for the meeting.*

The members *of the tribunal,* in the performance of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Article 25

The tribunal of arbitration sits ordinarily at The Hague.

Except in cases of necessity, the place of session can only be altered by the tribunal with the assent of the parties.

Article 26

The International Bureau at The Hague is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

[773] The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers, or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

ARTICLE 27

The signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

ARTICLE 28

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of *nine* members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It *shall present* to them an annual report on the labors of the Court, the working of the administration, and the expenditure. *The report shall likewise contain a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 22, paragraphs 5 and 6.*

ARTICLE 29

The expenses of the Bureau shall be borne by the signatory *and adhering* Powers in the proportion fixed by the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date of their adhesion.

Chapter III.—*Arbitration Procedure*

Article 30

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules which shall be applicable to arbitration procedure, unless other rules have been agreed on by the parties.

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Article 31

The Powers which have recourse to arbitration sign a special act (compromis) in which are defined the subject of the dispute, the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 39 of the present Convention must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The compromis shall likewise define, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

The compromis implies an engagement of the parties to submit in good faith to the arbitral award.

Article 31 *a*

The Permanent Court is competent to settle the *compromis,* if the parties are agreed to have recourse to it for the purpose.

It is similarly competent even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse can not, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

Article 31 *b*

In the cases contemplated in the preceding article, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 24, paragraphs 3 to 6.

The fifth member is *ex officio* president of the commission.

Article 32

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from

the members of the Permanent Court of Arbitration established by the present act.

Failing the composition of the tribunal by agreement of the parties, the course *referred to in Article 45, paragraphs 3 to 6,* is pursued.

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equally divided the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

[775] ARTICLE 33

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 34

The umpire is *ex officio* president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 34 *a*

When the *compromis* is settled by a commission, as contemplated in Article 31 *b,* and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

ARTICLE 35

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

ARTICLE 36

The tribunal sits at The Hague, unless some other place is selected *by the parties.*

The tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting *once fixed can not be altered by the tribunal, without* the assent of the parties.

ARTICLE 37

If the question as to what languages are to be used has not been settled by the compromis, it shall be decided by the tribunal.

ARTICLE 38

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates, except on behalf of the Power which appointed them members of the Court.

ARTICLE 39

As a general rule, arbitration procedure comprises two distinct phases: *written* pleadings and oral discussions.

The *written* pleadings consist in the communication by the respective agents *to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the compromis.*

The time fixed by the compromis may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

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ARTICLE 40

Every document produced by one party must be communicated *to* the other party *in the form of a duly certified copy.*

ARTICLE 40 a

Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

ARTICLE 41

The discussions are under the direction of the President.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the President. The minutes *are signed by the President and by one of the secretaries* and alone have an authentic character.

ARTICLE 42

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 43

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 44

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal, the tribunal takes note of it.

ARTICLE 45

The agents and counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 46

They are entitled to raise objections and points. The decisions of the tribunal on these points are final, and cannot form the subject of any subsequent discussion.

ARTICLE 47

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions can be regarded as an expression of opinion by the tribunal in general, or by its members in particular.

[777] ARTICLE 48

The tribunal is authorized to declare its competence in interpreting the *compromis* as well as the other treaties which may be invoked in the case, and in applying the principles of law.

ARTICLE 49

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, *order,* and time in which each party must conclude its *final* arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 49 a

The Powers in dispute undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute.

ARTICLE 49 *b*

For all notifications which the tribunal has to make in the territory of a third Power signatory of the present Convention, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests cannot be rejected unless the requested Power considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

ARTICLE 50

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case, the president pronounces the discussion closed.

ARTICLE 51

The deliberations of the tribunal take place in private, *and remain secret.*

Every decision is taken by a majority of members of the tribunal.
The refusal of a member to vote must be recorded in the minutes.

ARTICLE 52

The award, given by a majority of votes, must state the reasons on which it is based. It contains the names of the arbitrators; it is signed by *the President and by the registrar* or by the secretary acting as registrar.

Those members who are in the minority may record their dissent when signing.

ARTICLE 53

The award is read out at a public sitting of the tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

ARTICLE 54

The award, duly pronounced and notified to the agents of the parties at variance, settles the dispute definitively and without appeal.

[778] *ARTICLE 54 a*

Any dispute arising between the parties as to the interpretation and execution of the award shall, provided the compromis does not exclude it, be submitted to the decision of the tribunal which pronounced it.

ARTICLE 55

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

ARTICLE 56

The award is binding only on the parties *in dispute*.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter *inform all the signatory Powers in good time*. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 57

Each party pays its own expenses and an equal share of the expenses of the tribunal.

Chapter IV.—*Arbitration by Summary Procedure*

ARTICLE 57 a

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules, which shall be observed in the absence of special arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 57 *b*

Each of the parties in dispute *appoints an arbitrator.* The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes *two* candidates taken from the *general* list *of the members of the Court (Article 23) exclusive of the members appointed by either of the parties* and not being ressortissants of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decision by a majority of votes.

[779] ARTICLE 57 *c*

In the absence of any previous agreement the tribunal, *as soon as it is formed, settles* the time within which the two parties must submit their respective cases to it.

ARTICLE 57 *d*

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government which appointed him.

ARTICLE 6

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and *experts be called.* The tribunal has, on its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

FINAL PROVISIONS

ARTICLE 58

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers that were represented at the International Peace Conference at The Hague.

ARTICLE 59

Non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known their adhesion to the contracting Powers by a written notification addressed to the Netherland Government, and communicated by it to all the other contracting Powers.

ARTICLE 60

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 61

In the event of one of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals t ereto.

Done at The Hague, July 29, 1899, in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

(*Here follow signatures.*)

FIRST COMMISSION

SECOND SUBCOMMISSION

[783]

FIRST MEETING

JUNE 25, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 4: 10 o'clock.

The **President** offers as the program of the day the organization of the Bureau of the subcommission, and proposes to elect as substitute president, Mr. HEINRICH LAMMASCH, and as secretary, Mr. GABRIEL MAURA Y GAMAZO, Count DE LA MORTERA, by dwelling upon their experience and their qualifications. (*Applause.*) He believes that it would be preferable to postpone appointing a reporter until such time when the general discussion shall have established the general principles.

The PRESIDENT then asks if any member is desirous of submitting any propositions with regard to the order of the work.

Before replying to the question put by the PRESIDENT, Mr. **Louis Renault** desires to make an exclusively material observation. He believes it useful that the projects submitted, instead of appearing along with the *procès-verbaux,* be printed on separate sheets in order to enable the delegates to keep separate records for the different questions.

The **President** approves of this view of the matter and states that this course will be followed hereafter.

Mr. **Louis Renault** then takes up the question put by the PRESIDENT with regard to the order of the work. He states that the Commission is confronted by a difficulty due to the submission of two projects.[1] These projects, no doubt, are directed to a common aim, that is to say, to permit of having recourse against the decision of the national prize courts, but they endeavor to attain that end by different means. It seems to him impossible to take as basis of the discussion either the German or the English propositions, without appearing to be partial from the very beginning.

In the opinion of Mr. LOUIS RENAULT, it would be preferable to take from the two projects before the Commission the various questions to be solved, of course without indicating the solution of them. After the *questionnaire* thus drawn up shall have been exhausted by the discussions, it would be well to ask in what manner an agreement might be reached with regard to a single text.

Mr. LOUIS RENAULT concludes by suggesting the organization of a committee of restricted membership to draw up the *questionnaire.*

[784] The **President** approves of the view expressed by Mr. LOUIS RENAULT and proposes that on the opposite page of the *questionnaire* there should appear the different parts of the two projects. (*Approval.*)

[1] Annexes 89 and 90.

He then sets forth the delicate nature of the work of the committee and proposes to have it consist of three members, two of whom should be representatives of the Powers that have submitted these projects, and the third Mr. Louis Renault, the author of the proposition. The committee, therefore, would be constituted as follows:

His Excellency The Right Honorable Sir Edward Fry, Mr. Kriege and Mr. Louis Renault. (*Unanimous approval.*)

His Excellency Mr. **Hagerup** calls the attention of the subcommission to a matter which he believes of considerable practical importance. Neither of the two projects deals with the matter of the burden of proof before the prize courts. He would like to know if this matter comes within the scope of the labors of the committee.

The **President** thinks that each of the members of the Commission may submit directly to the committee any new matters that might seem in need of being added to the projected *questionnaire*.

Upon a new observation presented by his Excellency Mr. Hagerup who would prefer to have settled in advance all matters coming within the jurisdiction of each Commission, the President adds that the doubt regarding the matter as to whether or not a question that is brought up comes within the competence of the First Commission or of another Commission, may always be easily dispelled through an understanding between the presidents of the two interested Commissions.

The President proposes to await the termination of the labors of the committee before fixing the date for the next meeting.

The meeting closes at 4: 30 o'clock.

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SECOND MEETING

JULY 4, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:45 o'clock.

The minutes of the first meeting are adopted.

The **President** reads, in the name of the four presidents, the following declaration:

In order to obviate delays in the labors of the Conference, the presidents of the Commissions have agreed to invite their colleagues to deposit before the end of the present week the propositions which they might intend to submit to discussion upon the various matters included in the program of the day of each one of the Commissions.

It is thoroughly understood that the right to submit subsequent propositions will be left intact, but those propositions which are not deposited before July 8 will be regarded as amendments to the projects already submitted. Their deposit may not, therefore, entail any adjournment of the discussions under way, and their examination will be connected with that of the projects already chosen as texts for our deliberations.

The PRESIDENT follows the reading of this declaration with some explanatory words showing how the labors of the Conference have been delayed up to the present by the continual submission of new propositions. The declaration aims at putting an end to this state of affairs.

The PRESIDENT then takes up the program of the day which calls for the discussion of the matters contained in the *questionnaire* prepared by his Excellency Sir EDWARD FRY, Mr. KRIEGE and Mr. LOUIS RENAULT, concerning the establishment of an international jurisdiction in the matter of prizes.[1]

His Excellency Baron **Marschall von Bieberstein** requests the floor and makes the following address:

I would like to present some remarks anent the proposition dealing with the prize jurisdiction which has been presented to the Commission by the German delegation.[2]

According to a principle universally admitted in the law of nations, every maritime prize must be confirmed by a judicial decision. At present, this
[786] decision proceeds exclusively from the jurisdiction of the belligerent captor. It is this captor who establishes the tribunals and regulates their procedure. Whatever may be the organization of this jurisdiction in the various countries, it cannot be denied that this state of things is not satisfactory

[1] Annex 90.
[2] Annex 88.

and is associated with grave inconveniences from the point of view both of the principles of justice and equity, and of the interests of individuals, as well as from that of the interests of neutral States and of the belligerents themselves.

Prizes are made in the name of the State and, in principle, for the account of the State. Hence, in the inquest as to the validity of the prize, the rôle of the captor State is that of the defendant. Its interest is engaged in having the prize declared valid; it is a question of securing for the State the profit of the prize; the State must dread, quite naturally, to see the military acts of its armed forces nullified and declared illegal. The prize tribunals established by the captor State act involuntarily more or less under the influence of these interests of their country. At all events, these national tribunals do not enjoy that high judicial authority which is based on confidence in the entire independence and impartiality of judges. This confidence cannot exist as long as the captor State has the rôle of defendant acting as judge. It is a natural consequence of this state of things that the national jurisdiction of prizes gives rise to constant disputes between the belligerents and neutral nations; and these disputes do not cease to envenom international relations.

It is, then, highly desirable that an international jurisdiction be established, whose impartiality cannot be doubted. Its purpose is twofold: first, to protect the rights of individuals; secondly—and this is a very important one,—to relieve the captor State from responsibility for the adjudication of prizes, which can thenceforth become no longer the subject of diplomatic claims. It is this two-fold purpose which is sought by the German project now within your hands, which proposes to internationalize jurisdiction over prizes by the establishment of an International High Court, composed of representatives of the belligerent Powers and of neutral States, and summoned to pass, in the second and last instance, on the legality of prizes adjudged, in the first instance by the national tribunals of belligerent Powers.

I desire immediately to refute an objection that might be raised against our proposition. It might be asserted that the creation of an international prize jurisdiction must be preceded by the codification of the rules of maritime warfare relative to prizes. But this codification is an integral part of the program of the Conference. We entertain the firm conviction that the Conference will perform this task. If, however, the Conference should not come to an agreement with regard to all the questions, this fact should not induce us to renounce an international jurisdiction.

For there already exists a conventional law between nations which regulates certain matters of maritime warfare. This law consists especially in the Declaration of Paris of 1856, and, furthermore, in certain treaties concluded between different States and containing provisions regarding war contraband.

In addition, one has not the right to doubt that if the labors of the Conference do not result in a complete codification of the rules of maritime warfare, the Conference will, at all events, succeed in regulating certain matters. The International Court ought, therefore, to apply, in the first place, these different conventional provisions. In those matters where conventions are wanting, the court in its decisions would be guided by the principles of international law; it would be incumbent upon it to give precision to the frequently indefinite and vague scope of these principles and it would thus become one of the most decisive and important elements for the development of the law of nations.

Such are the general ideas that inspired the German project.

I shall now permit myself to expound the principles that have guided us in the organization of the jurisdiction of maritime prizes. It has seemed to
[787] us desirable to give to the procedure before the International Prize Court the character of a suit between the owner of the vessel or of the goods captured, on the one hand, and the capturing State, on the other hand. This organization has been chosen for two reasons. Firstly, by bringing the controversies concerning maritime prizes into the regular channel of a judicial procedure between the parties directly interested, one is sure of preventing many disputes which the exercise of belligerent rights upon the seas might occasion. Moreover, access to the court will thus be made easy for the persons interested, and the neutral States will be relieved from examining the facts and from identifying themselves with the claims of their subjects.

The project affords the same protection to the subjects of the belligerent States and to those of the neutral States, a condition which meets the modern way of conceiving war as a struggle of one State against an enemy State, and not against the subjects of this State. Furthermore, the extension of the competence of the court to the claims of the subjects of the belligerent parties will serve to guarantee the observance of international treaties and of the principles of the law of nations with regard to the property of enemy subjects.

The project means to reserve to the national jurisdiction only the procedure in first instance; the decision in appeal devolves upon the International Court. It seems preferable not to continue those means of recourse before the national authorities foreseen in the legislation of the different countries. In this way the course of the procedure will be accelerated. It will also spare the susceptibilities of the capturing State, susceptibilities which might be roused by the criticism which the International Court might direct against the decisions of one of its supreme tribunals.

According to the project, a High International Prize Court will be instituted at The Hague especially for each maritime war and in accordance with rules similar to those of the Convention for the pacific settlement of international disputes. It will be closely connected with the Permanent Court of Arbitration, to which three of the five judges must belong and whose Bureau will serve as a place of registry. Acceptance of this proposition will, no doubt, contribute toward increasing the authority of the Hague Permanent Court of Arbitration.

The two judges not chosen from the membership of the Permanent Court of Arbitration will be admirals designated by the belligerent parties. This provision seems desirable to insure to the belligerents who at present exercise prize jurisdiction through their own tribunals, a legitimate influence in the High International Court.

As these two judges designated by the belligerents sit with three neutral judges, members of the Permanent Court of Arbitration, there is no danger that their influence may become preponderating. We propose to name admirals for these functions because, thanks to their technical experience, they will be able to elucidate controverted facts, and also because the assistance of naval officers is useful when judging of acts of war.

As for the procedure to be followed before the High Prize Court, we have endeavored to draft simple rules meeting the practical exigencies of prize matters.

The idea of leaving the judgment in regard to prizes to an international

authority is an old one. For a long time it has occupied the minds of statesmen and of scholars. For more than thirty years it has been the subject of the labors of the Institute of International Law; in the German project, the influence of the regulations, the fruit of these labors, will be seen.

We have confidence that the Conference will succeed in finding the right solution of the problems connected with the jurisdiction of prizes and we shall
[788] be happy to cooperate in a spirit of conciliation with our colleagues in the achievement of this noble task.

The good reception which has been accorded to our plan by two of the largest maritime Powers confirms our confidence. (*Applause.*)

His Excellency Sir **Edward Fry** states that he agrees with his colleague from Germany as to the necessity of establishing an International Court for maritime prizes. He answers, therefore, with a *yes* to the first article of the *questionnaire*. Then he makes some general remarks. In the present state of things, each nation proclaims for itself what it believes to be international law. The courts of each country thus feel bound by their national system of jurisprudence in regard to prizes. In order that an International Court may apply the veritable international law, its members must be free from all prejudices and from all partiality.

This impartiality is not, in our opinion, guaranteed by the German project which chooses the judges from amongst the belligerents, from amongst their friends, from amongst the friends of their friends. In our project,[1] on the other hand, the judges designated by the Powers in dispute are for each special case excluded from the court.

It is only by proceeding in this manner that an International Court will be obtained, composed of judges without prejudice and well-nigh without nationality. (*Applause.*)

The **President** remarks that he will not propose to have a vote taken at the present sitting and that the discussion of the details will not be taken up. He invites the members of the subcommission to proceed with the general discussion.

His Excellency Mr. **Ruy Barbosa** then speaks as follows:

In the name of the Brazilian delegation, we understand that it would be necessary to institute not only an international jurisdiction of appeal for matters of prize, but to commit as well to this jurisdiction cognizance of matters of prize from the first instance up. From the moment one accepts the principle which serves as a basis for the jurisdiction of appeal as the only just principle, why must it be restricted to the subsidiary rôle of repairing the errors of another jurisdiction? Nevertheless, as a transition to a future organization upon the basis of a complete application of the international composition in the two instances, we accept the plan of an organization upon this basis in the second instance, while provisionally retaining the national tribunals in the first.

His Excellency Mr. **Keiroku Tzudzuki** makes the following declaration:

The Japanese delegates greatly appreciate the lofty spirit of right and of justice which has inspired the propositions concerning the establishment of a High International Prize Court, and they would sincerely desire the complete realization of the idea contained in these propositions.

They regret, however, to feel compelled for the moment to abstain from concurring in an eventual convention upon the matter, unless they are first con-

[1] Annex 89.

vinced of the possibility of adopting and of enforcing a clear and precise codification of the international laws regarding prizes which, binding the said International Court, would serve at the same time as a basis of the national legislations, and would permit the Governments and the peoples to foresee with certainty the judgments of the court in question.

With a reservation in the sense indicated above, the Japanese delegation has, therefore, no hesitancy in answering affirmatively the first question upon the matter.

[789] His Excellency Mr. **Hammarskjöld**: In my judgment, the constitution of an International Court, charged with deciding in second instance controversies concerning maritime prizes, would constitute one of the greatest and most important forward steps, full of promise for the future. I believe, therefore, that we must not stop because of difficulties of a rather theoretical order which might be opposed thereto.

As regards the propositions that have been presented on the part of two great countries, choice is perhaps not easy to make.

I dare hope, however, that it will be possible to find an intermediate solution which may combine the principal advantages of the two systems.

The **President** expresses the opinion that it would be well to take into account, in the first place, the order in which the discussion shall be continued.

May we even now proceed with the reading of the *questionnaire* and take a vote after each article? Or ought we, on the contrary, to reserve our voting until all the articles have been discussed?

The PRESIDENT will be glad to receive any suggestion with regard to this matter.

His Excellency Mr. **Asser**: Would it not be best to read in the first place the articles of the *questionnaire?* Delegates desirous of giving their opinion might do so freely without passing upon this first exchange of ideas by means of a vote. The projects for the Prize Court have hardly left the field of theory: it is best to proceed slowly in order to introduce such an innovation into practice. After having heard the remarks which may have been presented in the course of the reading of the *questionnaire,* our three colleagues who already have drawn up the *questionnaire* may perhaps give answers which shall summarize the gist of the discussions and the views of the assembly. It will then still be time to come to a conclusion by means of a vote.

The **President** thanks Mr. ASSER for the suggestions he has just made. He states that it is not our purpose to be counted, but to come to an agreement. Any attempt to that end will be fruitful, and the best means to reach that goal will be to postpone voting as long as possible: in the meantime we may study the *questionnaire* and its articles one by one, by calling for the opinion of each one, without seeking, for the moment, any definitive conclusion. (*Approval.*)

The PRESIDENT reads Article 1 of the *questionnaire*[1] prepared by his Excellency Sir EDWARD FRY, Mr. KRIEGE and Mr. LOUIS RENAULT:

ARTICLE 1

Is there occasion to create an International Court of Appeal for prize cases?

(*No remarks.*)

[1] Annex 90.

The PRESIDENT reads Article 2 of the *questionnaire:*

ARTICLE 2

Shall the Court to be created decide only between the belligerent State to which the captor belongs and the State making claim for its subjects who have suffered loss from the capture, or may the matter be laid before it directly by the private persons claiming to have suffered loss?

His Excellency Sir **Edward Fry** justifies the British proposition[1] as follows: Since it is intended to create an International Court, it is logical that the parties that are to appear before this court should be nations, the subjects
[790] of international law being only nations. On the other hand, if private individuals were entitled to appear in person, difficulties might arise: for in certain cases, the States may be opposed to such kinds of recourse. It is wiser, therefore, to leave them the judges as to whether or not they are to submit the grievances of their subjects to an International Court.

Mr. **Kriege** states that the German proposition[2] which foresees a judicial procedure between the parties directly interested and not a procedure between the States, is founded upon the following considerations:

In the first place, it is very desirable to prevent as far as possible international conflicts which arise anew in every war with regard to the exercise of the prize law. This would be attained by granting to private individuals who have suffered loss the right to address themselves, without the intervention of the State within whose jurisdiction they come, to the International Prize Court. It could not be hoped to obtain the same result in case the interested States were themselves to institute the suit which would be scarcely distinguishable from an arbitral procedure. Rather it is to be feared that the negotiations begun with regard to such a suit might interfere with the good relations between the two States.

In preparing for such a suit the plaintiff State would, furthermore, frequently find itself in an embarrassing situation. It would be incumbent upon it to examine the status of law and of fact before identifying itself with the claims of its subjects. In the absence of an exact acquaintance with the facts, making it therefore frequently impossible to proceed to such examination, it would be confronted by the unpleasant alternative either of neglecting its duty to protect those coming within its jurisdiction or of supporting ill-founded claims. For the same reason, acceptance of the German proposition would make access to the Court more easy for private individuals who have suffered loss, in view of the fact that it would be solely dependent upon their own will to have recourse to its decision. As regards the fear that the tribunal would in such case be confronted with vexatious claims, this inconvenience might be obviated by adopting the provision foreseen in the German project and in accordance with which the defeated party would have to bear the expenses occasioned by the procedure.

His Excellency Mr. **Hagerup** approves of the general idea of an international prize jurisdiction. It has a special importance for the small States having a large merchant fleet. He supports the view expressed by his Excellency Baron MARSCHALL with regard to the present difficulties encountered in the operation of national tribunals which are at one and the same time judges and parties to the dispute.

[1] Annex 89.
[2] Annex 88.

As to the system to be chosen, he believes it preferable to admit the direct recourse of private individuals. For to force the Governments to take initiatives each time when the fate of a prize is to be settled, would but complicate the labor: the small States would frequently be stayed by diverse political considerations. On the other hand, they would have to inform themselves of the details of each case in default of which they would be placed in a false situation; this study would tend to slacken the action of the State and make it very timid.

His Excellency Mr. HAGERUP also approves of the view-point of his Excellency Mr. RUY BARBOSA. It is in conformity to the interests of the small States having a large merchant fleet to permit private individuals to have recourse, from the first instance onward to an international court. But, at all events, the nature of a conflict between States must not be attributed to such cases. Prizes are matters that concern the capturing State on the one hand, and private individuals on the other hand. Being already parties to the suit in first instance, it is natural that private individuals should continue to be parties to the suit in appeal. (*Applause.*)

Mr. **Antonio Sánchez de Bustamante,** in the name of the delegation of the Cuban Republic, speaks as follows:

[791] My eminent colleague, the first delegate from Norway, has just recalled to our minds the real interest which the small States may have in the organization of an international prize jurisdiction and which must be regarded as a universal aspiration.

The delegation from the Cuban Republic has studied this matter, for, although speaking in the name of a small nation, the State which it represents has a commerce of importation and exportation which is relatively important.

Nevertheless, one may think that the result of the answer to the question that has been put will remain in doubt, after our having listened to the reasons that have been formulated here by several of our colleagues.

As has already been stated, prize matters are of special importance to private individuals declaring that they have suffered loss. Why then, it may be asked, are the States to which these private individuals belong solely and necessarily brought in the suit? Why deprive a private individual who has suffered loss, of all right and of appeal, and for whom, on account of political, economic or other reasons, the State would not desire to appear before the High International Prize Court?

And, on the other hand, why make the State bear the expenses, the possibly very high expenses of an international suit? Why compel the State to make investigations and to secure proof which it is possibly easier for the private individual himself to gather and lay before the tribunal?

To be sure (and this brings us to the other side of the question), the interests and the rights of neutral commerce are in charge of the State which must watch over and generally does watch over its protection. And if the State itself desires to take over the representation and the defense of the person coming within its jurisdiction, it is not easy to see what reason can prevent it from doing so, in an international convention.

For these reasons the delegation of the Cuban Republic has felt inclined to propose a formula of conciliation to the subcommission.

The right to have direct recourse to the International Prize Court might be granted both to the Governments and to private individuals, but in always giving

to the State a right of preference over the right of appeal of private individuals.

Colonel **Borel** speaks as follows:

Although not a maritime State, Switzerland has nevertheless considerable interests at stake in the matter under discussion; I may, therefore, be permitted to offer a remark in support of the proposition of the German delegation.

It seems incontestable that in accordance with the tendency of progress in international matters, every private individual must be put in position to secure directly from a foreigner that justice which is due him, without compelling his Government to intervene in order to insure such a result. It seems to me that the German project very happily meets this idea in view of the fact that it insures to each private individual who deems himself injured, recourse to the international jurisdiction and does not obligate the State under whose jurisdiction he comes, from instituting an action in his stead. This, it seems, is one more reason for giving preference to this solution.

The **President** reads Article 3 of the *questionnaire:*

ARTICLE 3

Must this Court take cognizance of all prize cases, or only of cases in which the interests of neutral Governments or private citizens are involved?

[792] His Excellency Sir **Edward Fry** observes that there are certain questions between belligerents which it is impossible to submit to an International Court. The state of war suspends certain legal relations between the States in conflict.

His Excellency Sir EDWARD FRY declares, in consequence, that his Government is disposed to submit to an international jurisdiction the rights of neutrals with regard to the belligerents, but in no way those of the belligerents between themselves.

Mr. **Kriege** states that there are two reasons which, in the opinion of the German delegation, militate in favor of the proposition tending to open the International Court to those coming within the jurisdiction of the belligerents.

In the first place, this would be in conformity with the modern notion of war, according to which the inhabitants of the enemy country are not put without the pale of the law. Modern warfare is a struggle of one State against another State; according to the dictum of NIEBUHR, the celebrated historian, it is the geniuses of the States who wage battle against one another.

On the other hand, and in so far as they concern persons coming within enemy jurisdiction, the application of the rules of the international prize law would not be sufficiently guaranteed if the jurisdiction of the High International Court were not to extend to the subjects of the belligerent States. There exist already conventional rules of this nature, especially the formula of the Paris Declaration: "The neutral flag protects enemy merchandise." The question would still increase in importance if it were possible to accept the proposition of the United States of America which contemplates the abolition of the right of seizure. It would be logical to place under an effective protection the conventional provisions which are expressly stipulated in the matter of warfare with regard to the treatment of enemy property. If the question were settled in the opposite way, one would expose himself, from the juridical point of view, to

unjustifiable consequences, for instance, in case the cargo of a neutral vessel seized by the belligerent as contraband should one-half belong to a neutral subject and the other half to a person coming within the jurisdiction of the enemy State. Such a cargo might be declared legitimate prize by the national jurisdiction, whilst the International Court would perhaps decide against the validity of the prize. In the same juridical conditions, the neutral would recover his property and the enemy would lose his.

The **President** reads Article 4 of the *questionnaire*.[1]

ARTICLE 4

When shall the International Court begin to act?

May the case be laid before it as soon as the national courts of first instance shall have rendered their decision as to the validity of the capture, or is it necessary to wait until final judgment has been rendered in the State of the captor?

His Excellency Sir **Edward Fry** sets forth two arguments by which he shows that it is desirable that international jurisdiction in appeal should only operate as a supreme court. He reminds the members of the subcommission that certain great maritime States possess ancient prize courts of high repute: the United States of America is proud of its Federal Supreme Court, and Great Britain is proud of the Committee of the Privy Council of the King.

The British Government is in no way inclined to surrender the jurisdiction of its ancient courts and would not permit an international tribunal to examine a decision rendered by the courts of first instance without previously granting to the English subjects recourse to their highest jurisdiction in matters of maritime prizes.

[793] It seems to him wiser, moreover, that before deciding with regard to the validity of a prize captured by a State, appeal should be had to the men in that country most capable of giving competent advice. Coming, as it does, in the last instance, the International Court will thus profit by all the light of the anterior decisions.

Mr. **Kriege** admits that from the theoretical point of view it would be desirable to keep intact the different national instances of the prize jurisdiction. He believes, however, that grave objections of a practical and political nature are held against this retention.

He finds practical objections in the fact that prize procedure would be rendered singularly slow and costly. Experience has shown that the duration of such a suit is always very long, because of the difficulties in securing the acceptance of proofs. In exhausting the two or three national instances which exist already in the majority of the States or might be established, and in order to reach a final decision, the lapse of several years is frequently required. In the meantime, the capital, oftentimes very considerable, represented by the vessel and the property seized, is paralyzed, whilst the rapid development of commercial relations demands in our day a prompt settlement of disputes. Furthermore, the expenses of a prize procedure are usually very high so that the various recourses in several instances are accessible only in the case of objects of great importance. By allowing several national instances to subsist, the most of the prize matters would be denied the benefits of the international jurisdiction. In the opinion

[1] Annex 90.

of the German delegation these reasons should bring us to limit prize jurisdiction to two instances, by substituting the new International Court in the place of the national courts of appeal and of recourse.

Apart from these practical considerations there is this other reason of a political nature, to the effect that the well understood interests of the capturing State demand that not the decisions of its supreme prize court, but the decisions of a lesser tribunal shall be submitted to the criticism of the International Court. For the supreme judicial authority of a State represents, in a certain sense, that State. Care should, therefore, be exercised not to expose its decisions to annulment by an International Court.

His Excellency General **Porter** requests the PRESIDENT to permit him to submit in writing to the Commission several suggestions with regard to the articles already brought to discussion.

The **President** authorizes the delegate of the United States of America so to act. In the next place, and before closing the meeting he desires to thank the delegates who were good enough to express their opinions by which they have elucidated the questions included in the program of the day. The loftiness and courtesy that have manifested themselves throughout the discussion are an honor to those who took the initiative.

The meeting closes at 12:25 o'clock.

[794]

THIRD MEETING

JULY 11, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10:45 o'clock.

The minutes of the second meeting are adopted.

The discussion of Article 4 of the *questionnaire*,[1] begun at the preceding meeting, is continued.

His Excellency Sir **Henry Howard** makes the following declaration:

You are already acquainted with our point of view concerning certain provisions of the project which has for its object the creation of a High International Prize Court. It remains for us to call attention, as briefly as possible, to two or three points anent the composition and the functions of the proposed court which we believe it important to put into a clear light in order to avoid any misunderstanding, and in order to permit the Commission to come to a decision with full knowledge of the facts.

Gentlemen, according to the project submitted in the name of the German delegation,[2] the court would be organized only at the beginning of the war, and by the belligerents. It would, therefore, be created *ad hoc*, with no element of stability, with no tradition, and the transitory nature of which would not fail to harm its prestige and rob its decisions of any and all moral worth. In our judgment, the great defect of the present system is found in the national character of the prize courts, resulting in the giving to the belligerents of the exclusive power to determine the rights of neutrals. But it is this very system that the German project would perpetuate by conferring the right of appointment of the judges only to the belligerents, to the friends of the belligerents or to the friend of their friends. However great the hostility between the belligerents may be, they will always have to defend common interests with regard to neutrals, and the decisions of such a tribunal would never be acceptable to the neutral parties, by reason of its composition.

The German project provides that the two judges appointed in the first place shall be admirals and it has no provision which might obligate the parties to give seats to jurisconsults whose competence in matters of international
[795] maritime law would be universally recognized. We are far from denying the great services which may be rendered by naval officers and the exceptional qualities with which the chosen admirals might be endowed; but we may be permitted to doubt whether in the course of their career they may have acquired that necessary knowledge permitting them, not only to decide questions of international law, but also to contribute to the development of its principles.

[1] Annex 90.
[2] Annex 88.

It is the jurisconsults of all times, from GROTIUS down to our day, who, in elaborating the principles of international law, have made the convocation of the present Conference possible, and it is upon the efforts of future jurisconsults that we may rely for continuing the work of peace and of justice already begun.

Gentlemen, the British project[1] is of a different nature, for it provides for the creation of a permanent court which will have a regular system of procedure and a continuity of principles. The court will be organized in time of peace and not at the beginning of hostilities: its members will be appointed, not by the belligerents as such, but by the States largely interested in maritime commerce. One of the principal objects of the project will be to insure the impartiality of the decisions by the exclusion, in each case, of the judges appointed by the parties in dispute. We are even disposed to add a clause which would exclude judges appointed by the belligerent Powers not involved in the litigation. It is likewise stipulated in the project that the judges must be chosen from amongst those whom special competence would seem to designate for this purpose. Furthermore, we see no inconvenience in authorizing the court to invoke, in any question of fact, the expert knowledge of one or several naval officers who would sit as assistant judges with only consultative voice, and who might not be the subjects or citizens of a belligerent Power or of a Power involved in the dispute.

Gentlemen, in adopting the principles just indicated, you will create a court worthy of the respect of the civilized world and of the task with which it will be entrusted.

The British Government would certainly hesitate in resorting to a tribunal created as the needs of the moment arise, tainted with partiality, but it would willingly submit to the decisions of a court such as we have proposed to you, whose learning would be incontestable and its independence guaranteed, and it would consent that appeal to this court might be had from decisions of the highest court of appeal of Great Britain for controversies of this nature, that is to say, from the Judicial Committee of the Privy Council.

His Excellency Mr. **Hagerup** presents the following remarks:

It is evident, even as admitted by the second delegate of Germany, that the system proposed by the British delegate is the more logical when it is desired to retain the national jurisdiction in the first instances. That shows that this mixture of national and international jurisdiction presents serious inconveniences and that it would be most rational to establish an international jurisdiction for all the instances. I have already stated that from all points of view this system would be preferable in my opinion. But if this object cannot be attained at this time, we must at least guard against the evident inconveniences of a too large accumulation of instances, inconveniences which might easily result in rendering the proposed organization useless for the small nations, and for cases in which very large economic interests are not involved. I would like to have you bear in mind what it would mean to exhaust all the national instances. We have had examples of suits lasting three years before a decision in the last instance [796] was reached, and the expenses frequently amount to enormous sums. It is, therefore, easily seen what the subsequent accumulation of instances may lead to. I take the liberty of suggesting two amendments to the British proposition, if the latter is to prevail:

[1] Annex 89.

1. That the signatory States obligate themselves not to establish more than two national instances. This will, moreover, correspond to the present situation in most of the modern legislations.

2. That the parties will always have the right to waive recourse to a national instance. As regards prize matters coming within its domain, there can be no objection to having a State waive its right to resort to all the national courts, and establish the right to resort from the first instance directly to the International Court of Appeals.

His Excellency Lieutenant General Jonkheer **den Beer Poortugael**: I desire to take the floor to state that, in a general way, the delegation of the Netherlands shares the opinion which his Excellency the Minister from Norway, Mr. HAGERUP, has just expressed.

To be sure, we may feel happy and satisfied that it should have been proposed to create an International Supreme Prize Court, but we firmly believe that it would be desirable not to have to wait until all the national instances have been exhausted before having recourse to this International Court.

I recall that in the celebrated book of CHARLES DICKENS, entitled "Bleak House," we read of a suit, "Jarndyce *versus* Jarndyce," which dragged along in such way that all those involved in the case had lost their minds, had died or had become bankrupt before the close of the suit.

I fear that before the three or four instances of national courts have passed upon the case—extending possibly over a period of several years—the unfortunate prize owners may have died or become bankrupt, and that, at all events, the expenses of these instances will have been so great, that the parties may not be able to bear the expenses of a suit before the International Supreme Court. We believe, therefore, that there should be at most two instances.

His Excellency Mr. **Choate** states that he reserves for himself the right to present the thoughts to which he had referred in the last meeting until such time when the discussion shall have covered all of the articles.

He will then avail himself of the opportunity to present, if necessary, propositions of conciliation.

The **President** reads Article 5 of the *questionnaire*.

ARTICLE 5

Shall the International Court be a permanent organization, or shall it be constituted only when a war breaks out?

Mr. **Kriege** states that the question as to whether or not the international prize jurisdiction shall be of a permanent nature, should be viewed, in the opinion of the German delegation, from the following standpoint:

There would be, in the first place, a certain contradiction involved by conferring a permanent character upon a tribunal that might be intended to operate only in the abnormal case of war. Furthermore, public opinion might perhaps not understand the reasons which might have led the Peace Conference to [797] such a resolution. Mr. KRIEGE admits, however, that a permanent court would have the advantage of offering more guarantees with regard to the continuity of jurisdiction. For this reason, the German delegation, in elaborating its project, has taken into consideration the establishment of a permanent court. But in seeking the solution of the problems connected therewith it encountered

practical difficulties which it could not overcome. The court must be a world institution, judging of the rights of those coming within the jurisdiction of all the States. It seems logical, therefore, to ensure the influence of the totality of these States upon its composition. It is, of course, agreed that it would not be possible for each distinct State to designate a member of the court. The court composed of so many judges would scarcely be able to perform any practical work. On the other hand, by restricting the number of States authorized to designate the members, one would avoid with difficulty, the reproach of failing in equity. It is this objection especially which, in the opinion of Mr. KRIEGE, would rise against the British proposition which establishes a relation between the right of designation and the total tonnage of the merchant fleet of a State. Furthermore, it might be objected to the British proposition that, according to the circumstances some vessels more or less might decide as to the right of the State to designate a judge. For the differences between the merchant fleets of certain countries are rather small, and there are some that are but little removed from the limit proposed by the British delegation. Furthermore, there exist great divergences between the statistics of the countries indicating the tonnage of the merchant fleet, so that contrary results would be reached relative to the right of the States to designate judges, according as one might accept the indications of the one or of the other statistical bureau.

His Excellency Mr. **Ruy Barbosa** offers the following remarks with regard to Article 5 of the *questionnaire* and asks to be permitted to give his opinion as well with regard to Article 6, so that he may not have to take the floor again:

As regards the matter of the fifth question, we concur unhesitatingly in the English proposition. The idea adopted in the German proposition in which, however, excellent solutions are met with in regard to other points, the idea, I say, of constituting the International Prize Court at the opening of hostilities, does not seem to us to be the best.

In this way we would merely have tribunals constituted for the time being, accidental tribunals, variable and ephemeral tribunals, and in consequence, tribunals that would not be able to inspire nor would deserve the full confidence of the parties interested and of public opinion, which is absolutely necessary for the success of this institution.

Magistrates *ad hoc,* transitory and designated at the moment when the war, at its outbreak, brings up such vigorous conflicts between the interests of the nations and produces such serious troubles in the conscience of the people, would possess neither the stability, nor the knowledge of jurisprudence, nor the habit of judging, nor, as would frequently happen, the freedom of mind, that is to say neither the conditions of professional aptitude nor those of a material and moral independence which are essentials to a sound juridical direction and to an inflexible application of the law.

It is the permanence of the function which yields these constitutive qualities of the good judge.

Appointed for a special occasion they would be exposed in their choice to influences of every kind which arise from the moment when the struggle begins.

War, especially when it breaks out between great Powers, gives rise to passionate currents, currents that put the world in motion and divide it, through sympathies or advantages, between the two belligerents. In the very heart of man, neutrality is nearly always partial for the one or for the other of the enemies

[798] confronting one another. We may trust, therefore, only a tribunal constituted in advance, with guarantees which free it at least from the direct and occasional action of these elements. And from this point of view, we find a useful solution in the English project.

In the composition of the court, in so far as competence for the appointment of its members is concerned, we do not like the plan offered us through the English proposition. It reserves the right to designate them to the Powers whose merchant fleet, at the time of the signature of the convention which we are drawing up, exceeds a total of 800,000 tons.

In the first place, the proposed standard would be incomplete, because it refers only to fleets of more than 800,000 tons at the time of the signature of the convention, and does not foresee the indubitable right of those Powers which, in the course of their development, should in future reach the same standard.

Nevertheless, this is not its most serious defect. The most serious of its defects, if we are not mistaken, consists in the provision which grants exclusively to fleets of more than 800,000 tons, the power to designate the members of this jurisdiction. When, for the establishment of an authority, we adopt bases such as this, we appear to concern ourselves only with the interest of the great, or at least to recognize supremacy in them; but we are not concerned with interests, we are concerned with the exercise of a function which must be strictly judicial. And from this point of view it is not easy to admit this exclusivism of a minimum of tonnage as a source of competence.

Gentlemen, I foresee your answer. We will be told that we must find a visible condition with which the acquisition of this power is connected, and, since we are dealing with controversies concerning the merchant fleet, the interest in behalf of a good distribution of justice in a tribunal to whose composition several nations contribute, is, naturally, to be measured according to the importance of the merchant fleet owned by each of these States.

But, whatever one may think of this relation as between the spirit of justice and the spirit of interest, it will not satisfy the general feeling of the nations.

Remember that it is not merely to the commerce of these nations possessing an 800,000 tonnage that we are seeking to give juridical guarantees. It is a court of universal jurisdiction that we are about to create. All the fleets, large or small, will come under its jurisdiction. Do you believe that all will have equal reasons to trust themselves to judges in whose appointment they have had no share whatever?

Do not forget that under this *régime* the weak will have to submit to the justice of the strong. These may have common interests that may prompt them not to respect sufficiently those considerations upon which the right of the rest depends. As a general rule, it is the most powerful who have the least reason to observe the law. Why then, should we reserve to these the privilege of judicial authority?

The thing is the less admissible because we would thereby grant to the Prize Court a principle wholly different from the one applied by the Court of Arbitration. As regards the latter, we have adopted the principle of general representation on the part of the interested nations. If there are reasons to modify, in the application, this principle with regard to the Prize Court, there are none whatever to interfere with it and to reject it openly.

After all, the merchant fleets excluded on the ground of not having each the indicated tonnage, represent a total tonnage by far superior to that which assures to each of the rest the right to have a voice in the nomination of the tribunal. Why then exclude from a share in this right this important mass, composed of the small fleets, but more imposing than several of the larger ones?

[799] In consequence, we propose that the nations whose fleets are inferior to the fixed tonnage, be admitted to the nomination of the members of the court, by means of an agreement between them with regard to the choice of the judges, or by any other system whatever, by means of which the same result is attained.

The **President** reads Article 6 of the *questionnaire*.

ARTICLE 6

Whether the Court be permanent or temporary, who may be members of it? Only jurists designated by nations having a navy of a size to be determined, or admirals and jurists, who are members of the Permanent Court of Arbitration, designated by the belligerents and by neutral States?

Will it be necessary, in a given litigation, to exclude the judges of the nationality of the interested parties?

Mr. **Kriege** states that Article 6 of the *questionnaire* concerns the two following questions:

1. What elements shall enter into the composition of the court?
2. Shall the belligerents exert an influence upon this composition?

The German project proposes to compose the International Prize Court of two admirals and three jurists, members of the Hague Permanent Court of Arbitration. Through the presence, among the judges, of three members of the Hague Tribunal, the Prize Court would be closely connected with this institution. In the opinion of the German delegation, it would be desirable to appoint admirals to these functions because they are able to elucidate points of fact, and also because it seems useful to have recourse to their technical experience in order to judge acts of war. We should grant them the right to participate, with deliberative vote, in the decisions of the court. We would then be certain that they will be the better aware of their responsibility than they would be in case they sit only, with consultative voice, in their quality as mere counsellors, impartial in principle, but who would, nevertheless, be more or less pleaders of the belligerents.

With regard to the second question, Mr. KRIEGE sets forth that the German proposition was animated by the idea that it would be just to grant to the belligerents a certain influence upon the composition of the International Court. He recommends this manner of procedure because, having hitherto exercised in full sovereignty the prize jurisdiction in all the instances, the belligerent parties will hesitate less to submit to the decisions of the High Court if they are therein represented. Moreover, the German delegation shares the opinion of the British delegation to the effect that it is important to insure the absolute impartiality of the decisions of the court. It believes that, in this respect, its project offers sufficient guarantees. As soon as they depart from their duty of impartiality, the two admirals whose votes are set against each other will always find themselves, in the tribunal, confronted by three jurists of the Hague Court named by

neutral States from whom a conscientious appreciation of the facts may be expected. If one were to admit that the impartiality of the members of the court might be influenced through the interests of their compatriots, neither would the acceptance of the British proposition furnish an absolute guarantee of the impartiality of the judges. In the first place, all neutrals are greatly interested in the restriction of the rights of the belligerents. Any judge
[800] belonging to a neutral State might, furthermore, be affected by the consideration that the decision which he reaches in favor either of a neutral or a belligerent would prejudge possibly the interests of his compatriots. Finally, cases might be referred to in which the interests of so many different nations would be involved that there would hardly be left in the tribunal any member who might not be interested along this line in the outcome of the dispute.

His Excellency Mr. **Hammarskjöld** states that according to the explanations which have just been given, the German delegation is not opposed, in principle, to the constitution of a more or less permanent tribunal for maritime prizes, but that it has certain doubts regarding the possibility of organizing it satisfactorily. This statement seems to indicate the path which must be followed in order to reach a conciliation of the different opinions.

The Swedish delegation fully concurs with its German colleagues in rejecting the idea of reserving to the largest maritime Powers the exclusive right of participating in the composition of the international tribunal as regards its juridical elements.

We must find new paths: the first Brazilian delegate has just pointed to one, and we can easily think of others. We might, for instance, think of a mode of international election for a fixed period.

All these methods being, of necessity, somewhat complicated, his Excellency Mr. HAMMARSKJÖLD proposes that the assembly have the matter studied by a special committee, under the reservation, nevertheless, that the British delegation does not, at this time, declare its opposition to any modification of the system which it advocates.

His Excellency Sir **Edward Fry** rises to inform the assembly that the silence maintained by the delegation of Great Britain must in no wise be interpreted as an acquiescence to all that has just been said.

He is of opinion that jurists are more competent than naval officers to take part in the tribunal in question. Nevertheless, he would in no way refuse to offer to the latter a place within the tribunal, as assistant judges, and would certainly grant to them consultative voice. These men of high technical competence will thus have the opportunity of enlightening the hearing before the court.

His Excellency Mr. **Martens** observes that in view of the fact that Russia has not, according to the English project, the necessary minimum of maritime tonnage to be represented in the High International Court, her delegate will confine himself to the presentation of some purely academic remarks.

He realizes that the solutions found with regard to the matter in discussion, by the two projects confronting each other, offer important differences. His personal preferences are for the German system which does not reduce the rôle of the admirals to that of mere assistants, but makes of them real judges with the right of voting.

His Excellency Mr. MARTENS believes that only the presence of officers

representing the belligerent States will offer to the latter a sufficient guarantee for the respect of their interests. These officers will have all the required competence to expound the laws and the rules of their country. We must, in this matter, take into account the legitimate susceptibility of the belligerent States, which demands that the rights of the captor be defended.

According to his Excellency Mr. MARTENS, it is frequently difficult, in the course of the debates which may be public, to develop things which it is easy enough to expound behind closed doors. Therefore in his opinion, the presence of officers within the tribunal in their quality as members of that tribunal is necessary.

As regards the composition of the tribunal, the Russian delegation believes that the presence of three neutral members as advocated by the German project, is sufficient guarantee of impartiality.

[801] His Excellency Mr. MARTENS is aware of the multiplicity of propositions in this regard and he remarks in this connection how much the existence of a court at The Hague, really permanent, would facilitate the composition of the Prize Court. It would suffice, in the beginning of each war to add to the list of permanent members the admirals of the belligerent parties.

His Excellency Mr. **Choate** makes the following address in English:[1]

It may be timely for me at this moment, with your approval, to express the views and position of the delegation which I represent on several of the questions which have been discussed.

Representing as we do a widely extended maritime nation, and a nation which hopes and confidently expects always in the future to be a neutral nation, we deem the establishment of an International Court of Prize by this conference to be a matter of supreme importance, and while we have very distinct and generally very positive views upon each of the questions under discussion, we consider the establishment of a court far more important than to impose upon it our own local or national views either as to its constitution or its powers. It will certainly be a tremendous triumph of justice and peace if this Conference, before it dissolves, shall succeed in creating such an arbiter between the nations.

Therefore I think that the best possible service I can now render on the part of our delegation and of the entire subcommittee is not to urge strongly our strong and fixed opinion, but to suggest, if possible, some middle way by which the opposing views entertained by different nations may be harmonized and reconciled so as to create the court. Better any court, however constituted, and with whatever powers, than no International Court at all. One great International Court will be a marked advance in the progress of the world's peace and will go far to satisfy the universal demand which presses upon us so strongly from every section of the world.

You will not then regard me as waiving or receding from our national views upon any question if I proceed now, with a view to that harmony without which it is impossible to create any court, to consider very briefly some of the particular questions which have agitated the committee, and upon which the views of the able representatives of many Powers have been expressed in such highly intelligent and useful ways.

Take for instance the fourth question,—whether the appeal to the Inter-

[1] See footnote, *post*, p. 809.

national Court in Prize shall be directly from the court of first instance or from the court of last resort.

If we were now pressed to a vote on that particular question, we should have to side very strongly with the position taken by the British delegation, and it would be found that our tenacity upon that would be as firm, and, if I might use a stronger word, as obstinate, as that of our British colleagues; because our people, by history and tradition, are so much in love with the Supreme Court of the United States, which they so believe to be the tribunal in which the gladsome light of jurisprudence rises and sets, and to be a court which commands the almost equal respect and admiration of other nations, that we could hardly go home in safety with the report that we had unnecessarily consented to any plan which would leave that court out of the administration of prize law.

I think we may state, without contradiction, that in the last hundred years it has taken a very considerable part in the making of the prize law which [802] now constitutes a portion of the established international law of the world, and that its decisions in prize are in substantial conformity with the decisions in all the maritime jurisdiction which have dealt with the subject, so that we are as firmly wedded to it as an indispensable factor in the future adjudication of prize law as our colleagues of the British delegation are to their court of last resort. It was to the decisions of the great Lord STOWELL that our great jurists MARSHALL and STORY looked for light and leading on such questions, and it is not too much to claim that together they settled the law for the world.

And so in respect to the second question,—as to whether the appeal should be taken by the individual suitor whose property has been condemned in a prize court, or by the nation to which he belongs.

We entertain a pretty clear view upon that point, that if the appeal is to go from the court of last resort it may well be taken by the individual suitor and not by his nation, but possibly under some general rules of limitation, to be prescribed by his nation, so that the nation may have some power to prevent an individual appeal, perhaps on some very trifling case, from embarrassing or calling into conflict its established policy.

But strong as our views are on these two questions, I deem it our duty, if possible, to find some middle way by which they may be reconciled or at least adjusted and coordinated with those of other nations, who quite as firmly contend that the appeal should be from the court of first instance and by the nation to which the subject or citizen whose property has been condemned in prize shall belong.

We should like therefore to suggest the possibility of the introduction of a feature which should accomplish the result in both these respects desired by both the contending parties, and that is, that the appeal should be taken from such court and by such party, whether individual or nation, as the laws of the nations to which the respective parties belong and to whose entire jurisdiction they are subject, shall by reciprocal legislation prescribe. Certainly a suitor against whom the case had gone in the court of first instance would cheerfully submit to whatever the law of his country prescribed in that respect, whether he should himself appeal or submit it to his nation to do so or not, as it might decide, and whether he should appeal directly to the International Court of Appeal in prize or seek the judgment of the higher court or courts of the nation condemning him. As to our firm conviction in favor of the appeals being

taken only from our own Supreme Court, it might well be that Congress, with a view to adjustment of the question, might reciprocally consent to an appeal by aliens from the courts of first instance, and, in view of the enormous benefits to be derived by the whole world from the successful establishment of an International Prize Court, would be sustained in so doing by the popular judgment.

In respect to the third question, the one point which we should insist upon in any choice that might be made between the two alternatives proposed by the question, is one which I think will be agreed upon by all the nations. Necessarily, whichever alternative is adopted, neutrals, whether as individuals or Governments, will have the greatest interest in the proceedings and decisions of the court, but in no event must we allow to a national an appeal against the decision of the highest court, or of any court of his own nation, condemning him for a violation of its own law or of a blockade which it has established. Experience shows that when a nation establishes a blockade its own citizens are apt to be the most flagrant in their attempts to violate it, and it would never do to allow to the subjects of any nation an appeal to any other tribunal from the decision of the courts of his own country condemning him for a violation of its own laws, as for instance its Foreign Enlistment Act, or for an attempt to violate a blockade established by it.

Then as to question five,—whether the international jurisdiction of the Prize Court shall have a permanent character or shall be constituted
[803] for the occasion of each war. The delegation of the United States of America is most earnestly in favor of a permanent court lasting not for each war, which might make it almost an annual affair, because wars are so numerous, but a court which should last for all time, and should gradually settle all international differences in prize law and establish an international jurisprudence which should cover all cases and satisfy and command the confidence of all nations. But here, too, is there not a middle ground which might afford a resting place for all conflicting views? With much diffidence we would suggest that the court might, as to its jurisdiction, be permanent in its character, but with a special feature or element adaptable to each war as it might arise.

Suppose the court to be composed permanently of three or five judges and thereby maintain its continuity through all wars and under all circumstances, with a right, in the case of war arising, to each belligerent to add a member to the court. Will not that be practicable, and ought it not to satisfy the reasonable demands of each party to any war that might unfortunately arise? I offer this, not as a final proposition, but as a possibility for ultimate consideration in the effort to solve the difficulties that confront us.

And lastly, as to the equally important question, What element shall enter into the composition of the court, whether it be permanent or temporary? It is most earnestly contended on the part of several nations that that court should consist only of learned jurists, and that no other element should enter into its composition, and we are one of the nations who are strongly convinced of that view. A court is a court, and a jurist is a jurist, and in our judgment the introduction of any other element than jurists tends to detract to that extent from the true judicial character which the tribunal should possess. On the other hand, it is claimed, with equal confidence and earnestness, that it should consist in part, at least, of admirals who are not jurists and do not claim to be, but who are justly

claimed to have special qualities and skill to contribute to the solution of maritime and prize questions. Now while we cannot consent to accept that method of constituting a court, is there not an approach to it which may satisfy, approximately at least, the claims of both contending parties? I think myself the importance of the claims of those who contend for the introduction of admirals or naval experts as a component part of the court are greatly overestimated. If, as Mr. KRIEGE of the German delegation concedes, the two admirals appointed by the contending belligerents should neutralize each other, it might be a useful and interesting contribution by belligerents to neutrality, but would it really do any good? If each admiral, sitting at either end of the court, is to neutralize or kill the other off, why have them at all? Will it not simply end in their mutual slaughter without adding any new life, strength or vigor to the court? Why put them up upon such an exalted bench for the mere purpose of shooting each other down?

And if, as Mr. MARTENS of the Russian delegation has insisted, it is necessary to have the presence in the tribunal of experienced admirals or learned naval experts, without whose advice and concurrence the decisions of the court cannot be reached, is it absolutely necessary to give them seats upon the exalted bench itself, and will not chairs placed a little lower satisfy all the necessities and reasonable demands of the occasion? May they not be present, not
[804] absolutely as judges to give the decision, but as advisers without whose full advice no decision can be rendered? No one would claim that they should be present as expert witnesses to be examined and cross-examined; but they would be in the highest degree useful as skilled experts with the same authority as the judges to examine and cross-examine the witnesses and to collate and arrange the proofs. Would it not also be entirely practicable to admit them to the consultations of the secret chamber of the judges and to provide that no decision should be rendered until they had been admitted to such consultations and fully maintained their views?

And so, Mr. President, on the subsidiary question contained in question six,—whether in a given litigation in prize judges of the nationality of the parties concerned shall be admitted to sit,—our delegation has very positive views that they should not be so admitted, that the admission of nationals to a conflict should not be and could not be permitted, because they could not be impartial judges in a litigation to which they were really parties in interest. But it must be admitted that in many important arbitrations to which our nation has heretofore been a party, it has not only consented, but sometimes insisted, that some member of the tribunal should be of our own nationality, and even appointed by our Government, so that this is also a question upon which contending views may well, and perhaps easily, be harmonized.

Now, Mr. President, I have thrown out these views, or I might rather say suggestions, crude as they are, to lead up to a proposition which, in the interests of harmony, I think may well be made at this moment. You observe that I have not attempted to enforce any of our opinions, however firmly we may hold them, for I think that it is impossible, in a subcommission consisting of a hundred or more members, to solve any such questions. The more we discuss them, the more our divergences of opinion are likely to be increased, and there is danger that a protracted and persistent discussion in a commission of such large dimensions may result in putting us wider apart instead of bringing us nearer

together. There is a certain pride of opinion which asserts itself in public discussion before such an audience and leads each of us to be more unwilling to yield anything of our contentions in such a presence. But convinced as I am that there are no questions here involved that are not capable of solution if each of us is inspired, as I hope we all are, by a desire to make mutual concessions for the sake of the immense benefit to be gained by all by the constitution of an International Court in Prize, though we may not really come to accept each other's views, we may give and take until a harmonious solution is reached. I therefore suggest, with all deference to the entire subcommission, that the only way out of our present difficulty is by remitting all the questions, after the valuable discussions that have now been had, to a committee of five or seven members to be appointed by the chair to consider and report upon a plan for the court, and this whether they are or are not able to answer with one voice all the questions which have been framed by the committee of three already appointed, and which the entire subcommission, in plenary session, has found it so difficult to answer.

I have not referred to those very important questions, numbers seven and eight, because we have not yet reached those in the orderly course of discussion, and because I assume that if the suggestion of our delegation is followed, those two questions, on which important reservations will doubtless be made before the subcommission, will be remitted with the rest for the consideration of the special committee to be appointed.

[805] His Excellency **Samad Khan Momtas-es-Saltaneh** makes the following declaration:

The Persian delegation declares that it associates itself with all those of its colleagues who express the need of creating an International Prize Court, but it would regret to see all the States not owning 800,000 merchant tonnage excluded from participation in this court. The adoption of this provision would be a source of dissatisfaction to a number of States represented in this Conference, and would be contrary to the unanimous sentiments of justice and of conciliation by which the high assembly is animated. Fully realizing these sentiments of the Conference, the Persian delegation hopes that the Commission will succeed in finding an equitable combination in order to realize the essential humanitarian aim contemplated by the project for the creation of this International Court.

The delegation wonders if this object might not be attained by leaving with all the States represented in this high assembly the right to appoint one member; the court thus composed would proceed to the election for a term, to be fixed, of the members of the court who would sit permanently.

At all events, the Persian delegation would gladly adhere to Article 4 of the project of the German delegation regarding the prize jurisdiction in reference to the choice of the three members of the court from amongst the members of the Hague Permanent Court of Arbitration.

As regards the advantages coming from the permanency of the High Prize Court, it gladly concurs in the point of view expressed by the British delegation.

Mr. **Max Huber** makes the following declaration in the name of the Swiss delegation :

I believe it my duty to call the attention of the Commission to the fact that, with regard to the question under discussion, it is not only the interests of navi-

gation, but in particular those of neutral commerce in general which must be protected.

Without owning a navy, Switzerland has, nevertheless, a very important commerce extending beyond the seas, and it would not be equitable, it seems, to exclude her absolutely from any participation in the International Court which it is proposed to create.

The **President** proceeds by reading Article 7 of the *questionnaire:*[1]

ARTICLE 7

What principles of law shall be applied in the High International Court?

His Excellency Mr. **Tcharykow** expresses himself as follows:

The Russian delegation believes that of all the points in the *questionnaire,* Article 7 is the most far-reaching in importance. We believe that the manner in which this point is to be elucidated in the course of the discussions of the subcommission will have a very marked influence upon the decisions to be taken with regard to the other points.

Therefore, the Russian delegation has the honor of reserving the privilege of expressing itself in detail with regard to the various matters concerning the establishment of an international prize jurisdiction, until after Article 7 of the *questionnaire* shall have been sufficiently discussed and brought to conclusion.

His Excellency Baron **Marschall von Bieberstein** finds that Article 6 of the British project replies satisfactorily to Article 7 of the *questionnaire.*

According to the British proposition, the Prize Court will in fact have to apply in the first place the conventions to which the Powers in dispute are signatories. This is an incontrovertible point.

[806] In the absence of conventional provisions, the court shall proceed in accordance with the principles of international law. In the case of controversy anent these principles, the court will have to decide and will thus contribute to the development of international law.

His Excellency Sir **Edward Fry** desires to express the great satisfaction he has had in listening to the words of his eminent colleague from Germany. He admits that there is an agreement between the two projects with regard to an important point, and he accepts it as an augury of success.

The **President** reads Article 8 of the *questionnaire.*

ARTICLE 8

Is it necessary to regulate the order and the method of taking testimony before the High Court?

His Excellency Mr. **Hagerup** opens the discussion in the following terms:

I was the first to bring up this question in the meeting of July 4 of this subcommission. Permit me at present to explain my point of view:

Must the burden of proof of the circumstances upon which depends the validity of the seizure of a vessel or of a cargo devolve upon the captor or upon the one from whom his property was taken?

In practice, the question frequently takes the following form: a cargo of coal has been destined to a commission merchant in a port of one of the bellig-

[1] Annex 90.

erents—we presume that this is a person whose quality does in no way indicate the ultimate destination of the cargo. The latter is seized as being contraband. A suit in recovery follows; the captor asserts that the neutral who shipped the cargo must prove that its destination was not hostile and that, if this proof is not furnished, the seizure must be confirmed. This point of view has frequently been approved by prize courts; it is also sanctioned by publicists of high repute. Nevertheless, it is erroneous and in contradiction with the general principles of law. He who appropriates the property of somebody else must prove his right thereto. It is alleged that the plaintiff is the claimant and that he must prove the justice of his claim. But this is not correct; if, for instance, my neighbor puts up any building whatever on my plot of land, I am not held to prove that he has no right to incumber my property, but it devolves upon him to prove his right to use my property. It matters little which of us two has instituted the suit. The case would in no way be different if the State itself had gone beyond the boundary line of its domain. Presumption in favor of the agents of the State acting in the exercise of their functions could not, therefore, be set up as a general principle.

The present state of things has been the source of a large number of unjust decisions on the part of the prize courts. It might be remedied by recognizing the true principle. This, of course, will not prevent the judge from freely appreciating the circumstances of a special case, nor from establishing legal presumptions, such, for instance, as those proposed by the German delegation in its project anent war contraband. Our rule is intended to insure to the person whose property was captured a favorable settlement in all cases involving a doubt as to the legitimacy of the capture.

While discussing proofs in prize matters, I take also the liberty of calling your attention to the desirability of establishing some general rules con-
[807] cerning legitimations that might be regarded as sufficient in case of search concerning the proof of the nationality, the ownership and the destination of a vessel or of a cargo. Various projects have been elaborated in this respect. For instance, it has been proposed to make use of governmental certificates. Still other means might be imagined.

I am not submitting any propositions, but I have desired to present these thoughts to the courteous attention of the committee of examination.

His Excellency Mr. **Nelidow** asks to be permitted to return again to Article 7 of the *questionnaire*. He has listened with much interest to the communication made by the first delegate from Germany, when he concurred in the British project.

He wonders, nevertheless, if it would not be proper for the High Court to take into account the legislation of the country of the captor.

Having to decide acts of naval officers, it would seem that it ought to take into account the laws, regulations and instructions of their home land, all of which are of obligatory force.

His Excellency Sir **Edward Fry** believes it to be his duty to state that the greatest evil in the present situation precisely arises from the multiplicity of the national rights in prize matters. In his opinion it is most important to establish an international jurisdiction which shall apply a uniform law.

His Excellency Mr. **Nelidow** is pleased to find that the remarks of his Excellency Sir Edward Fry, full of wisdom, agree with the declaration made

by his Excellency Mr. TCHARYKOW. The essential thing in this matter is, no doubt, to find an international law which might be accepted throughout the world.

Mr. **Kriege** believes that the rules anent the burden of proof in prize matters must be viewed in the same way as the material right. He believes, therefore, that he may rely, in this connection, upon the remarks made by his Excellency, the first delegate from Germany, with regard to the seventh question. The court would, in the first place, have to apply the rules regarding proof which are to be established by the Conference. Both the German proposition concerning war contraband and the proposition made by the Italian delegation with regard to blockade, contain provisions in this respect. In the absence of explicit rules regarding proof, the court should be guided by the general principles and by the universally accepted rules of the law of nations.

His Excellency Count **Tornielli** expresses himself as follows:

The Italian delegation desires that an agreement be reached as between the various views which have been expressed in this important discussion and expresses the hope that the work of the committee of examination may insure the application of the principle of an international jurisdiction in prize matters.

His Excellency Mr. **Mérey von Kapos-Mére** makes the following declaration:

In the name of the Austro-Hungarian delegation, I desire to state that we have been absolutely won over to the principle of the establishment of an international jurisdiction for prize matters. In the first place, we accept this principle because we feel convinced that in carrying it out, the Conference will accomplish an eminently useful and practical work. But we approve of it also because it seems to us that the fundamental idea upon which rest both the proposition of the German delegation and that submitted by the delegation from Great Britain meets especially that which I would term the spirit of our Conference, that is to say, the tendency and the desire which all of us hold in common, to substitute in certain matters, and, of course, as far as possible, in the place [808] of the will of a State, in the place of the decision of a Government or of the organs of a Government, a will and a decision which are international.

But we have not been satisfied with adopting the principle. We have also seriously and conscientiously examined the details of the two propositions which are before us. This examination has, moreover, been usefully completed by the very interesting and high-minded discussion to which we have listened in the last meeting of this subcommission and in the meeting of this day. If we were confronted by the alternative of having to choose between the one or the other of the two propositions under discussion, our preference would unhesitatingly go to the German project which, it seems to us, offers greater guarantees for a useful and frequent operation of the High Prize Court. Nevertheless, I am of opinion, and many of our colleagues will hold a like opinion,—that at least at the present time, we are not as yet faced by the necessity of choosing between the two projects. The hope is justified that the delegations from Germany and Great Britain, animated by a like desire for good understanding of which some precious elements have disclosed themselves in to-day's meeting, will perhaps succeed by means of mutual concessions in removing the differences that now exist between their propositions.

It is with this hope in view that I reserve for myself the right to express my opinion with regard to the details of these two projects and that I support the proposition of his Excellency Mr. CHOATE with regard to the formation of a drafting or examining committee upon which would devolve the task of conciliating the two projects.

The **President** states that the general discussion has now been brought to a close.

I believe, he says, that I will meet the general sentiments in stating that this discussion has been highly interesting and useful. Although the *questionnaire* has brought out the difficulties in the matter, the discussion has led us toward solutions whence an agreement might be expected.

To bring about this agreement, you have heard the desire expressed that a committee composed of competent men be formed in order that they may draw up one text which might be submitted for your approval.

To sum up all, the discussion has shown an agreement on the part of all with regard to the two principal points: the creation of a Prize Court, on the one hand (Article 1); the definition of the general rules of law by which this court must be guided, on the other hand (Article 7). In this connection we have seen that the authors of the two propositions hold about the same view.

All the remaining questions are relatively of secondary importance, and will easily be solved by the committee.

Feeling that it was necessary to bring this up, and anticipating the requests made in the course of this meeting, your President permitted himself to negotiate in this respect with the delegates from Germany and Great Britain.

He proposed to them that three representatives of States designated by the German delegation and three others designated by the British delegation should be added to the three authors of the *questionnaire* and to the bureau of the subcommission.

His Excellency Sir EDWARD FRY designated the United States, Italy and Portugal.

His Excellency Baron MARSCHALL VON BIEBERSTEIN proposed Russia, Norway and the Netherlands. (*Approval.*)

His Excellency Mr. **Nelidow** offers his thanks to his Excellency Baron MARSCHALL for the honor he has shown him by inviting him to become a member of the committee of examination, but he recalls that the Russian delegation had reserved for itself the right to give its view upon the entire question after No. 7 of the *questionnaire* shall have been agreed upon: therefore, he prefers not to take part in the labors of the committee in order that he may reserve full freedom of judgment.

[809] His Excellency Baron **Marschall von Bieberstein** requests Sweden, in consequence, to designate a representative in the committee in the place of Russia.

On the other hand, it is agreed that as Mr. LOUIS RENAULT is greatly taxed by his work in the other Commissions, Mr. FROMAGEOT will be admitted to take his place.

As a result of various remarks and of the designations made by the first delegates, the committee is finally constituted as follows: his Excellency Sir EDWARD FRY, his Excellency Baron MARSCHALL VON BIEBERSTEIN, Mr. LOUIS

RENAULT; their Excellencies Messrs. CHOATE, Count TORNIELLI, Marquis DE SOVERAL, HAGERUP; Mr. LOEFF and his Excellency Mr. HAMMARSKJÖLD.

The members of the Bureau of the subcommission, his Excellency Mr. LÉON BOURGEOIS, president; Mr. HEINRICH LAMMASCH, vice president, and Mr. MAURA, Count DE LA MORTERA, secretary, will, according to custom, also form part of the committee of examination.

The subcommission will be called together at a date to be fixed subsequently, when the committee shall have concluded its labors.

The meeting closes at 12: 30 o'clock.

[The annex to this meeting (pages 810-813 of the *Actes et documents*), being the original English text of the remarks of Mr. CHOATE which appear *ante*, pages 800-804, is not printed.]

FIRST COMMISSION

SECOND SUBCOMMISSION

COMMITTEE OF EXAMINATION

[817]

FIRST MEETING

AUGUST 12, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5:50 o'clock.

The **President** introduces the discussion anent the project prepared by the delegations of Germany, the United States of America, France and Great Britain, relative to the establishment of an International Prize Court.[1]

His Excellency Sir **Edward Fry** speaks as follows:

GENTLEMEN: You will remember that two projects relative to the establishment of a Prize Court, presented at the beginning of our meetings, the one by the ambassador of Germany,[2] the other by myself,[3] resemble one another in no way although they contemplated the same object. Since that time we have labored together in order to seek to conciliate the two points of view; and I acknowledge with great pleasure the spirit of conciliation and of compromise evidenced by the German delegation; likewise I recognize the service which Mr. CHOATE has rendered us through his conciliatory suggestions, and the usefulness of the collaboration of the French delegation. Now, gentlemen, you see the result of all this: a project for a Prize Court, presented in common by the delegations of four great Powers who request the other Powers to give it a friendly welcome.

In this project there are certain points that we regard as essential; there are others that may not be deemed essential. We deem it necessary that the number of judges should not exceed fifteen and that the deputy judges be represented by a like number; that eight of the great Powers should designate eight of these fifteen judges and eight of the deputy judges. These eight Powers not only possess the greatest naval forces, but very important merchant fleets as well; and in all probability they are the only Powers that will appear as parties to suits before this new Prize Court. We propose that the other seven judges and seven deputy judges be designated by the other Powers, either in accordance with the method that we have just indicated, or by any other method agreed upon between the parties.

Gentlemen, I know well that this project contains many details: that each of these details might be open to criticism; but you have in your hands the result of a prolonged and conscientious labor of the delegations of four Powers,
[818] and I beg of you to accept it, as much as possible, in its present form, and to insure by your cordial approval a result very important for the settlement of international disputes, and for the honor of the Conference.

[1] Annex 91.
[2] Annex 88.
[3] Annex 89.

Their Excellencies Baron **Marschall von Bieberstein,** Mr. **Choate** and **Mr. Léon Bourgeois** in the name of the French delegation, concur in the words expressed by the first delegate from Great Britain.

With the approval of the committee, the **President** proceeds by reading the articles of the project.

PART I.—General Provisions

Article 1

The validity of the capture of a merchant ship or its cargo shall be decided before a prize court, in accordance with the present Convention, when neutral or enemy property is involved.

(*No remarks.*)

Article 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts shall be pronounced in public or officially notified to the owners concerned who are neutrals or enemies.

(*No remarks.*)

Article 3

The judgments of national prize courts may be brought before the International Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to:

(a) Cargo on board a neutral ship;

(b) Or an enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(c) Or finally a claim based upon the fact that the seizure has been effected in violation either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

His Excellency Count **Tornielli** proposes that the phraseology of Article 3, No. 1, be modified as follows:

> 1. when the judgment of the national prize courts affects the *interests* of a neutral Power or the *property* of a neutral individual.

He thinks that it is proper to establish in the Convention a distinction between the interests which a Government must safeguard and which are entrusted to it—and the property of the private individuals or of the State.

Mr. **Louis Renault** thinks that the combination of Articles 3, No. 1, and 4, No. 1, will give satisfaction to the remarks of Count Tornielli.

[819] The project has conferred upon the States the right to substitute themselves in the place of a person coming within their jurisdiction in case the seizure of a vessel should injuriously affect their interests, as, for instance, in the hypothesis of the seizure of a mail steamer.

Mr. **Kriege** states that in the drafting of the project an essential difference was made between the property of private individuals and the interests of a State.

An effort was made to avoid the joint appearance of two plaintiffs defending, one his property, and the other his interests, and to the Governments was given the right to take in hand, at their pleasure, the cause of those coming within their jurisdiction.

Mr. **Eyre Crowe** explains, in his turn, that the authors of the project have sought to afford recourse to the neutral Powers and the private individuals only for the protection of their properties and in no way for the protection of their interests.

His Excellency Mr. **Hagerup** brings up another question.

He asks the authors of the project if they have sought to assimilate all real rights with property, and if they accord, for instance, to holders of bills and to bottomry lenders the right of recourse to the prize tribunal, in their quality of principals interested in the thing seized.

After an exchange of views in this matter, it is agreed to permit the interested parties, who in accordance with their national legislation have a right of intervention, to appeal to the Prize Court for the safeguarding of their interests.

His Excellency Sir **Edward Fry** asks, however, that those interested who had not intervened in the suit in the first instance should not be admitted before this court.

The **President** requests Mr. KRIEGE to examine the various national legislations and to submit a text to the committee.

The following articles do not give rise to any remarks:

ARTICLE 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2 *b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b*.

ARTICLE 5

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

ARTICLE 6

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.

[820] In the absence of such provisions, the Court shall apply the rules of international law.

If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2 *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor when it is of opinion that the consequences of complying therewith are unjust and inequitable.

ARTICLE 7

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

ARTICLE 8

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—CONSTITUTION OF THE INTERNATIONAL PRIZE COURT

His Excellency Mr. **Ruy Barbosa** proposes to postpone the discussion of Part II. The project has in fact been distributed at a late moment, and he desires to be able to study it undisturbed and to await the instructions of his Government.

His Excellency Sir **Edward Fry** calls attention to the difficulty of the problem which the authors of the project have had to solve. The composition of the court is a delicate matter for which an effort has been made to find a compromise solution.

Mr. **Eyre Crowe** then explains the proposed system. The project attributes only fifteen judges to the forty-seven States gathered at the Conference; it has seemed difficult to admit more without encountering great inconveniences in practice. With regard to the apportionment of the seats among the different Powers, their maritime interests, as being the most important element in this matter, have been taken as the basis. He adds that sight must not be lost of the fact that certain nations will only profit by the new institution, whilst others, owning greater military navies will also have to fulfill certain obligations and certain duties. We thought that it was best to grant to those nations owning an important navy—and whose officers will, in consequence, have frequently to justify their conduct before the court—a direct and permanent representation.

As regards the apportionment of seats among other States, we considered it necessary to forego our original idea of having the judges elected by groups of States; such groups would have been too open to criticism to meet with the unanimous approval of the Conference. We have adopted a system of rotation in accordance with which, besides the judges appointed for six years, there will be others who will sit for a lesser period, determined according to the importance of the merchant fleets of their countries.

[821] Here follows a table showing the duration of the appointment of the judges according to the importance of the maritime interests of the States which shall have appointed them.

TABLE INDICATING THE NUMBER OF YEARS IN EACH PERIOD OF SIX YEARS

COUNTRY	JUDGE	DEPUTY	COUNTRY	JUDGE	DEPUTY
	YEARS			YEARS	
Spain	4	4	Argentine Republic	2	
The Netherlands	3	3	Brazil	2	
Belgium	2	2	Chile	2	
China	2	2	Mexico	2	
Denmark	2	2	Colombia	1	
Greece	2	2	Peru	1	
Norway	2	2	Uruguay	1	
Portugal	2	2	Venezuela	1	
Roumania	2	2	Bolivia	–	1
Sweden	2	2	Costa Rica	–	1
Turkey	2	2	Cuba	–	1
Bulgaria	1	1	Dominican Republic	–	1
Persia	1	1	Ecuador	–	1
Switzerland	1	1	Guatemala	–	1
Serbia	1		Haiti	–	1
Siam	1		Honduras	–	1
Luxemburg	–	1	Nicaragua	–	1
Montenegro	–	1	Panama	–	1
			Paraguay	–	1
			Salvador	–	1
	30	30		12	12

[822] Mr. **Eyre Crowe** gives in a few words the reasons for the different classifications contained in the table, and he justifies the order of the States as determined by the authors of the project.

His Excellency Mr. **Hammarskjöld**, without going into a discussion of the details, desires to make a general remark. One of the ideas that guided the authors in the conception of the table which we have before us is that the great Powers are most frequently the belligerent captors. But, in their turn, the small States may be involved in war—would it not then be proper always to assign them representation in the court for the duration of the war?

His Excellency Mr. HAMMARSKJÖLD observes that this representation will not necessarily increase the number of judges, because he proposes to have the judge of the belligerent Power sit in the place of another party designated by lot drawing.

His Excellency Mr. HAMMARSKJÖLD hopes that this provision will make the project more acceptable for a large number of States.

Their Excellencies Messrs. **Léon Bourgeois,** Sir **Edward Fry, Choate,** and Mr. **Kriege** approve of this suggestion and will come to an agreement regarding the phraseology of a clause in that sense.

The committee passes on to the examination of the articles of Part II.

ARTICLE 9

The International Prize Court is composed of judges and deputy judges who will be appointed by the signatory Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

(*No remarks.*)

ARTICLE 10

The judges and deputy judges are appointed for a period of six years reckoned from the date on which the appointment shall have been notified to the Administrative Council of the Permanent Court of Arbitration. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

The **President** remarks that the system of replacement adopted in case of death or resignation, will present serious difficulties in the plan of the periods indicated in the table.

ARTICLE 11

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointments (Article 10, paragraph 1), and if they sit by rota (Article 12, paragraph 3), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

They enjoy diplomatic privileges and immunities in the performance of their duties and when outside of their own country.

[823] Before entering upon their duties the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and upon their conscience.

His Excellency Count **de Selir** asks if the judges are to take the oath at the time of their appointment or at the time of their taking possession of their seats in the court.

After an exchange of views with regard to this matter, the committee decides to modify the phraseology of Article 11. The first fifteen judges shall take the oath upon their first meeting at The Hague and the rest only at the time when they take possession of their seat.

The **President** reads Article 12 which is reserved.

ARTICLE 12

The Court is composed of fifteen judges; nine judges constitute a quorum.

The judges appointed by the following signatory Powers: Germany, Austria-Hungary, the United States of America, France, Great Britain, Italy, Japan, and Russia, shall always be summoned to sit.

The judges and deputy judges appointed by the other Powers shall sit by rota as shown in the table hereto annexed.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 13

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, or act in any capacity whatever.

(*No remarks.*)

ARTICLE 14

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power which is a party to the

proceedings, or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

(*No remarks.*)

ARTICLE 15

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

The committee is agreed to confer upon the members of the court the right to appoint their bureau by correspondence and proposes to record this fact in the report.

[824] The **President** asks on this occasion that the committee be good enough to designate its reporter.

Mr. LOUIS RENAULT is elected by acclamation.

Article 16 is then taken up.

ARTICLE 16

The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country and, in addition, while the Court is sitting, or while they are carrying out duties conferred upon them by the Court, a monthly sum of . . . Netherland florins.

These payments are included in the general expenses of the Permanent Court of Arbitration and are paid through the International Bureau.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

The matter concerning the amount of the stipend to be granted the judges is reserved.

Articles 17, 18 and 19 give rise to no remarks.

ARTICLE 17

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure,* be transferred elsewhere without the consent of the belligerents.

ARTICLE 18

The Administrative Council is charged, with regard to the International Prize Court, with the same functions that it fulfills, under the Convention of July 29, 1899, as to the Permanent Court of Arbitration.

ARTICLE 19

The International Bureau of the Permanent Court of Arbitration acts as registry to the International Prize Court. It has charge of the archives and carries out the administrative work.

ARTICLE 20

The Court decides on the choice of languages to be used by itself and to be authorized for use before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

Upon a remark of his Excellency Sir **Edward Fry,** the committee decides to grant to the court the right to appoint official interpreters.

The **President** reads aloud the following articles which give rise to no remarks.

ARTICLE 21

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

[825]

ARTICLE 22

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the signatory States or a lawyer practicing before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

ARTICLE 23

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power applied to considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

His Excellency Mr. **Mérey von Kapos-Mére** observes that in some articles of the project reference is made to judges and to deputy judges, and in others only to judges.

Mr. **Louis Renault** (reporter) states that he will bear in mind this observation and that he will further look over the articles of the Convention.

The meeting closes at 7 o'clock.

[826]

SECOND MEETING

AUGUST 17, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 5 : 30 o'clock.

The minutes of the first meeting are adopted.

The **President** continues the reading of the project relative to the establishment of an International Prize Court.[1]

Articles 24 and 25 give rise to no remarks.

PART III.—Procedure in the International Prize Court

Article 24

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at four months, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

Article 25

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

Article 26

In the case provided for in Article 5, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within a month of the expiration of the period of two years.

[827] Mr. **Loeff** suggests that in Article 26 the words "*within a month*" be replaced by "*within thirty days,*" because the former expression is lacking in precision.

This modification is accepted by the committee.

[1] Annex 91.

ARTICLE 27

The Court officially notifies to the parties decrees or decisions made in their absence.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

(*No remarks.*)

ARTICLE 28

If the appellant does not enter his appeal within the period laid down in Articles 24 or 26, it shall be rejected without further process.

Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within two months after the circumstances which prevented him entering it before it had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

Mr. **Loeff** would like to know if in the case when prevention should intervene at the expiration of the period of four months, stipulated by Article 24, paragraph 2, the period contemplated by paragraph 2 of Article 28 would remain fixed at two months.

Mr. **Louis Renault** (reporter) explains that it had been the intention of the authors of the project to grant in all cases a period of two months after the ceasing of the prevention.

Upon a remark of his Excellency Sir **Edward Fry,** it is decided to replace the words "*within two months*" in paragraph 2, Article 28, by: "*within sixty days.*"

ARTICLE 29

If the appeal is entered in time, a true copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

(*No remarks.*)

ARTICLE 30

If the litigation involves a prize in which there are other parties concerned than the parties who are before the Court, the latter will await before dealing with the case the expiration of the period laid down in Articles 24 or 26.

Mr. **Heinrich Lammasch** calls the attention of the committee to the expression: "other parties concerned." It could certainly not have in view any other parties concerned except those mentioned under Article 4 of the regulations.

Mr. **Louis Renault** replies by stating that Article 30 does certainly refer only to the parties concerned and indicated in Article 4. The provision has for its sole object to join in one suit all those who might be parties thereto.

The **President** thinks that a more precise phraseology might be found to content Mr. LAMMASCH.

[828] Articles 31, 32, 33 and 34 give rise to no remarks.

ARTICLE 31

The procedure before the International Court includes two distinct parts—the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE 32

After the close of the pleadings, a public sitting is held in which the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on its own initiative, in order that supplementary evidence may be obtained.

ARTICLE 33

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 23, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 34

The parties must be summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 35

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

Mr. **Heinrich Lammasch** calls for an explanation regarding the expression "the senior judge present" in Article 35.

Mr. **Louis Renault** states that priority of appointment was had in view.

ARTICLE 36

The discussions take place in public subject to the right of a Power who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions which are written up by secretaries appointed by the president. These minutes alone have an authentic character.

Upon a question by Mr. **Loeff**, it is stated that a request for examination behind closed doors on the part of a Power could not be refused.

It is further decided that the provision of paragraph 2, Article 36, concerning the appointment of the secretaries, will find its proper place in the part dealing with the organization of the court.

[829] ARTICLE 37

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to proceed within the period fixed by the Court, the case proceeds without that party and the Court gives judgment in accordance with the material at its disposal.

(*No remarks.*)

ARTICLE 38

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements. It makes decision in accordance with its free and fully independent conviction.

After an exchange of views, the committee decides to omit the second sentence of Article 38, in view of the fact that the first clearly expresses the principle of the unhindered appreciation of testimony.

ARTICLE 39

The Court considers its decision in private.

All questions shall be decided by a majority of the judges present. If the number of the judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 4, paragraph 1, shall not be counted.

(*No remarks.*)

ARTICLE 40

The judgment of the Court must give the reasons on which it is based. It is signed by each of the judges that have taken part in it.

Mr. **Loeff** expresses his satisfaction because the minority will not be able to state its reasons for dissent in the decision. He believes, nevertheless, that the logical consequence of this principle must be the proclamation of the secrecy of the council chamber.

Mr. **Louis Renault** thinks that indeed this consequence is necessary, but that it is so natural that it need not be expressed.

The **President** proposes to add to paragraph 1, Article 39, the words: "*and the proceedings stay secret.*"

His Excellency Mr. **Choate** would like to know if the dissentient judges are obliged to affix their signatures.

The **President** replies by saying that it could not be otherwise, because in the contrary case they will make public their vote.

His Excellency Count **Tornielli** would like to know what would be the consequences of a refusal to sign on the part of the judges.

The **President** doubts that such a case might arise. The judge who would refuse to sign would violate the Convention relative to the Prize Court.

His Excellency Mr. **Hagerup** states that if it is desired that voting, even as discussion, should be kept secret, it must be expressly stated.

Mr. **Louis Renault** replies by declaring that voting cannot be separated from discussion. It is only the result of the vote, that is to say, the decision which is made known in a public meeting.

His Excellency Mr. **Hagerup** does not further insist.

[830] Mr. **Heinrich Lammasch** suggests that, in order to spare the dissentient judges the painful necessity of signing a decision of which they do not approve, it might be agreed that the decision should be signed by the President only. It is true that it might also happen that the President himself will dissent, but this hypothesis arises even in the national jurisdiction.

The **President** remarks that, if the decision were signed by the President only, the other judges might frequently contest the veracity of the text. Thus, the door to subsequent disputes would be opened.

Mr. **Kriege** believes it preferable that all the judges should sign. He feels that, under certain circumstances, the scruples of the President who should sign alone, might be greater than those of the other judges.

The **President** declares that the phraseology of Article 40 will be retained, but that the remarks of Mr. HAGERUP will be recorded in the report.

ARTICLE 41

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this notification has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

(*No remarks.*)

ARTICLE 42

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to the amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

Mr. **Loeff** would like to know if the difference between two amounts may likewise constitute "*the subject-matter of the case*" referred to in paragraph 2 of Article 42, and if the court is competent in such a case.

Article 7 of the project leaves this matter uncertain in supposing that the court always pronounces *either the validity, or the nullity* of the seizure.

Mr. **Kriege** answers by saying that a difference between two amounts may constitute "*the subject-matter of the case.*"

Mr. **Louis Renault** states that the report will take account of the remarks of Mr. LOEFF.

ARTICLE 43

The general expenses of the International Prize Court are borne by the signatory Powers in the proportion established for the International Bureau of the Universal Postal Union. Deduction shall be made of the payments made by the parties in accordance with Article 42, paragraph 2.

[831] His Excellency Mr. **Hammarskjöld** while admitting that the pecuniary question is not of great importance, proposes to apportion the expenses in the same ratio in which the judges designated by the different countries have the right to sit in the tribunal. In this way there would be correspondence between rights and duties.

Mr. **Kriege** approves of this manner of looking at the matter and proposes to put it as follows: "*in proportion to their share in the appointment of the judges.*"

His Excellency Sir **Edward Fry** remarks that the duration of the period during which the judges sit should exert some influence upon the apportionment of the expenses.

The **President** reserves the final phraseology of this article.

ARTICLE 44

When the Court is not sitting, the duties conferred upon it by Article 31 and Article 42, paragraph 3, are discharged by a committee of three judges whom the Court appoints.

The PRESIDENT proposes to add after the words *"Article 31": "paragraphs 2 and 3."*

ARTICLE 45

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

A discussion arises as to whether or not the secretaries shall be permanent or chosen especially for each case.

The **President** thinks that the question should be settled by the rules of internal organization.

The question is reserved.

His Excellency Mr. **Mérey von Kapos-Mére** asks if the Powers must ratify the rules of the court provided for in Article 45.

Mr. **Kriege** does not believe that a ratification, the securing of which might lead to difficulties, is necessary for rules of internal organization. A distinction must be drawn between these rules of internal organization and the modifications of procedure referred to in Article 46. The latter certainly require the approval of the Powers.

His Excellency Mr. **Mérey von Kapos-Mére** asks what will happen in case the court exceeds its competence in drawing up its own rules.

Mr. **Louis Renault** replies by saying that in such case the Powers may intervene.

The **President** states that the report will mention the remarks of Mr. MÉREY.

ARTICLE 46

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

(*No remarks.*)

[832]

PART IV.—FINAL PROVISIONS

ARTICLE 47

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A minute of the deposit of each ratification shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to all the signatory Powers.

(*No remarks.*)

ARTICLE 48

The Convention shall come into force six months after its ratification. The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts within six months following the ratification.

The Convention shall remain in force for twelve years, and shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in effect in the relations between the other Powers.

Mr. **Loeff** proposes that in the case contemplated by the first paragraph, the period referred to in paragraph 2 of Article 24 should be made to begin not from the day on which the decision was rendered or made known, but from the day on which the court actually entered into functions, that is to say, from the day on which the Convention went into force. Before that day the court does not exist, and, in consequence, cannot act.

Mr. **Kriege** states that an effort will be made to secure a phraseology that will meet the point made by Mr. LOEFF.

The **President** brings up for discussion the table relative to the distribution of the judges and substitute judges by countries.

His Excellency Mr. **Ruy Barbosa** reads aloud the following statement:

The organization of the International Prize Court and that of the International Court of Arbitration are two problems of an altogether different nature, the solution of which must evidently be based upon diverse principles. The constitution of the Permanent Court of Arbitration is a matter of universal interest. It does not consider the nations according to their relative importance. No differences of interests may be taken into account in this court, unless it be in favor of the weak against the strong.

The constitution of the International Prize Court, on the contrary, affects only those States that have interests upon the seas, that is to say, it affects almost exclusively those States owning a merchant fleet. Therefore, it is in proportion to the value of such a fleet that their rights should be measured in this matter. For this reason, it seems just to us to bring about an agreement between the countries that share among themselves the commercial navigation of the world, by taking this state of things into account, a state of things which concerns them only, and in distributing the rôles of each of the interested parties [833] in this common judicature according to the respective importance of their merchant fleet.

In consequence, we should have nothing to object to the bases themselves of the Franco-Anglo-Germano-American project. We consider its principle as reasonable. But the application of it seems to us sometimes unjust, unequal, contradictory; and it is this that we shall demonstrate in a brief, but precise manner, especially in so far as our country is concerned.

In that project our country is classed among those States to which only two judges are allowed, without any deputy judge, and for a period of two years out of six.

Is this an equitable classification?

We are going to show you that it is not.

As regards our merchant fleet, we dispose officially only of the statistical data of the year 1901, data which are rather incomplete for that time and even more so for this day, for in this branch of our national activity our progress has manifested itself in an evident form. Still, we need no other elements to show the flagrant injustice of the project in regard to Brazil.

According to official information, officially recognized as not including the total extent of our navigation, the Brazilian merchant fleet consisted of 338 steamers and 497 vessels of more than 50 tons, the latter representing 76,992 and the former 140,748 tons; this gives us a total of 835 vessels with 217,740 tons.

Now then; in 1903 the Belgian merchant fleet had but 102,000 tons; in

1904, that of Portugal had scarcely 113,535; in 1905, that of Roumania accounted for only 94,007 tons. Notice that with regard to these three countries we refer to years following 1901, when the statistics for Brazil end. Nevertheless, and in spite of this advantage in their favor, the Brazilian merchant fleet exceeds that of Belgium by 115,000 tons, that of Portugal by 104,000 tons, and that of Roumania by 123,000 tons. It is almost double that of Portugal, more than twice that of Belgium, and, with regard to the Roumanian fleet, it shows an even greater superiority.

Yet, Portugal, Belgium and Roumania figure in the scope of the project, each with a judge and a substitute judge for two years, whilst there is granted to Brazil but one judge without substitute.

We will forego comparison between Brazil and the other countries classed in the same category, such as Mexico and Chile.

We desire to call attention to inequalities in the distribution only between diverse categories, and not between the countries we find inscribed in the same category; for, to constitute a category, we can hardly ever meet with States of equal importance.

If we were to have the same standard of measurement for all, the countries to which we have just referred should be found alongside of Belgium, Portugal and Roumania whose merchant fleets are approximately the same as those of Mexico, of the Argentine Republic and of Chile. In consequence, the latter, even as the former, should have been entered with one judge and a substitute for the two years assigned to them. And Brazil, whose merchant fleet is by far superior to theirs, could not be put below them in the Prize Court.

But we would not deprive any one of the other nations of the place assigned to it in the project. We claim for ourselves only a place proportionately equal to that of the rest. From this point of view, which is the point of view of the project, we are entitled to twice the rights which Belgium, Portugal
[834] and Roumania have to the classification in the category of States to which is granted for two years one judge and a substitute.

In consequence, the project should be modified along that line.

But this is not the only point in which it shows a spirit of inequality.

Do you wish me to prove this assertion?

It can be done through a mere examination of the table that we submit to you, and in which the merchant fleet of each country is put opposite the number of judges to be assigned to each country, excepting Bolivia, Ecuador, Panama and Paraguay in respect of which we have no statistical data.

Germany	2,352,000
United States	6,456,000
Austria-Hungary	420,000
France	1,349,000
England	12,333,000
Italy	1,032,000
Japan	1,276,000
Russia	636,000
Spain	520,000
The Netherlands	1,164,000
Belgium	102,000
China	87,000
Denmark	453,000
Greece	381,000
Norway	1,486,000

	Portugal	113,000
	Roumania	97,000
	Sweden	673,000
	Turkey	241,000
	Serbia	0,000
	Siam	4,547
	Brazil	217,000
	Argentine	96,000
	Chile	82,000
	Mexico	21,000
	Bulgaria	2,736
	Persia	855
	Switzerland	0,000
	Uruguay	44,000
	Peru	30,000
	Venezuela	5,000
	Colombia	1,842
	Nicaragua	8,021
	Cuba	40,908
	Montenegro	5,417
	Guatemala	2,572
	Honduras	1,771
[835]	Costa Rica	1,222
	Salvador	514
	Haiti	3,188
	Dominican Republic	1,338
	Luxemburg	0,000

As can be seen, there is injustice everywhere.

Austria has 420,000 tons, Spain has 520,000. Well! to Spain is assigned one judge and a substitute for barely four years, whilst to Austria are assigned judges for the total period of six years.

Italy has 1,032,000 tons. The Netherlands has more, that is to say, 1,164,000; yet Italy gets a judge and substitute for six years, whilst the Netherlands has them for only one-half of that time. Why?

Whilst Austria, with 420,000, has a permanent representation for the full six years, Denmark, with 453,000, and Sweden with 673,000 have representation for only one-third of that period, that is to say, they are represented in the court during only two years. Why?

The 636,000 tons of Russia assure her of one of the permanent positions in the court. But the 676,000 of Sweden procure for her inscription in the fourth category, with two years of functions for the six year period. That is to say that with a tonnage inferior to that of Sweden, Russia is quoted for thrice the value of that of Sweden, in so far as the Prize Court is concerned. Why?

Japan with 1,276,000 tons secures permanent representation in the court. Norway with much more tonnage, that is to say with 1,486,000, receives but two years of representation in the court. Why?

Roumania with 97,000 tons has not only a judge but also a substitute judge for two years. The Argentine Republic with the same tonnage is given but one judge, without a substitute judge. Why?

Mexico with 21,000 tons is given two years' representation in the court. Peru with 30,000 tons receives but one year of representation. Why?

Colombia with 1,842 tons would be represented through one judge.

Guatemala, Bulgaria, Haiti, Cuba, all countries with a much higher tonnage, that is to say, with 2,572, with 2,736, with 3,188 and with 40,908, respectively, would be represented only by a substitute judge. Why?

Conditions are the same with regard to Montenegro with 5,417, and Nicaragua with 8,021, as compared with Venezuela which having but 5,000 tons secures, nevertheless, a judge. Why?

Siam which has hardly 4,000 tons is represented in the court by one judge for two years, alongside of Mexico which has 21,000, Chile which has 82,000, the Argentine Republic which has 96,000, Brazil which has 217,000, and above Peru, which with 30,000 and Uruguay which with 44,000 and Cuba which with 40,000 have each a judge for one year, that is to say, each of which with ten times the Siamese tonnage receives in the distribution of the judges, but one substitute judge. Gentlemen, why?

We find everywhere inequity carried to the point of absolute inversion of the rôles.

To confine myself in conclusion to that which concerns Brazil, I shall permit myself one more reflection, in order that the injustice of which this country is the victim may be fully realized.

There are three States not owning a single vessel, and they are, nevertheless, included in the distribution: Switzerland, Serbia and Luxemburg. Well! Of all these three countries with no fleet whatever, Luxemburg is the only one [836] placed below Brazil in this strange table. The other two, although represented by a zero in the statistics of merchant fleets, figure in the project of the Prize Court, the one alongside of and the other above Brazil whose merchant fleet is of 217,000 tons. It would not be just even to put them on the same level. But the project looks differently at these matters. To the zero by which Switzerland is represented, it attributes a judge and a substitute judge, and to the 217,000 tons of Brazil only one judge.

Our right to defend ourselves against such a great inequity is palpable. We appeal to the authors of the project, to their good sense and to their equity, with regard to these imperfections in their work, the defects of which we lay simply at the door of the difficulties and the urgency of the work which we are about to rush to a conclusion, for lack of time, even as in the case of all the great questions reserved until the very last moments of the Conference.

Kindly accept these remarks, not as a hostile criticism, but as a work of collaboration. Our divergences are not animated by any spirit of opposition, but by the desire sincerely to cooperate in a useful enterprise, the idea of which we welcomed from the moment it appeared in this Conference, when we expressed the desire that the Prize Court would have another and much wider sphere of action, in which the entire jurisdiction from the first instance onward would be included.

His Excellency Mr. **Gonzalo A. Esteva** finding that the project is unequal, unjust and inequitable, approves of the views expressed by Mr. Ruy Barbosa.

Mr. **Gabriel Maura y Gamazo,** Count **de la Mortera** declares that Spain accepts the proposed table; but he suggests at the same time a periodical revision of it.

His Excellency Mr. **Hagerup** states that the bases of the table might give rise to many objections. The original basis which was that of tonnage has been abandoned, and in its place has been introduced the principle of the preponderance of the eight great Powers, which usually will be found in the rôle of captors. It is all the more important that the minority should be represented by the Powers having the largest interests. Mr. Hagerup finds that, from

this point of view, Norway has not received that place which belongs to her according to the importance of her merchant fleet. Norway's tonnage comes third in the list; it amounts to 1,400,000 tons. It is greater than the total tonnage of the privileged countries coming in the table immediately after the great Powers and exceeds one-third of the total tonnage of the Powers figuring with her in the same group. Nevertheless, the Norwegian Government accepts the proposed table. It makes this sacrifice for the purpose of assisting in the fulfillment of a useful work which will have great consequences for the development of international law. (*Applause.*)

Mr. **Heinrich Lammasch** calls attention to the fact that the authors of the table decided to take into account not merely the tonnage, but also the importance of the military navy whose officers will have to defend themselves before the tribunal. The importance of commerce is also taken into account.

His Excellency Mr. **Ruy Barbosa** maintains his point of view by continuing in the belief that the main basis for the classification of the States in the Prize Court must consist in the relative importance of their merchant navy. Seizure is practiced against the merchant fleet. It affects the States, therefore, in proportion to their commercial navy.

[837] But if, in respect of the military navy and the value of the maritime commerce of the different States, the classification admitted in the project were subjected to an examination, his Excellency Mr. Ruy Barbosa thinks that the project would not withstand the test of this proof either. In all probability one would still, in several other points, meet with this inequality which violates the spirit of justice.

His Excellency Mr. Ruy Barbosa has not had more time than that which he found before 9 o'clock of this day to prepare the work which he has just submitted to the committee, for almost all the hours of the day are taken by his duties of appearing in the commissions and in the committees of which he is a member. But, if the discussion were adjourned as is advisable in view of the importance of the subject, he would undertake the same comparative study between the relative importance of the commerce of each State and that of the position attributed to it in the Prize Court.

At all events, his Government is not opposed to the project. On the contrary, it accepts the basis of it. But it believes that they ought to have been developed in a more equitable way, and it is simply with that end in view that, without disapproving of the project, it has merely charged its first delegate to present these objections, to which no answer has been made.

His Excellency Baron **Marschall von Bieberstein** remarks that the tonnage of the merchant fleet is too uncertain an element to serve as the sole basis in the matter. Small boats, for instance, such as fishing boats, may not be seized.

Mr. **Ruy Barbosa** replies by stating that in his statistical calculations he has taken into account only such boats as measure more than fifty tons.

Mr. **Eyre Crowe** states that it would be impossible to appoint a judge for each country, for the reason that if, for instance, there were attributed to Norway a position in the table proportionate to her tonnage, it would be necessary to give several judges to certain great Powers, so that the number of fifteen would be exceeded by far. It is necessary, therefore, that certain countries should expect to appear in the same group with Powers that have less tonnage than they.

As regards the substitute judges, Mr. Eyre Crowe remarks that the countries which have only substitute judges are those which in all probability will never figure in any dispute.

Finally, it was also necessary to take into account in the grouping of the Powers the resemblance between different systems of jurisprudence.

The **President** declares that the discussion is closed and the first reading terminated.

The proposition of Count de la Mortera will be taken under consideration and reserved for the second reading.

He states that the bases of the table may be regarded as having been accepted and he fixes upon Thursday forenoon as the date for the next meeting of the committee.

The meeting closes.

[838]

THIRD MEETING

AUGUST 22, 1907

His Excellency Mr. **Léon Bourgeois** presiding.

The meeting opens at 10: 15 o'clock.

The minutes of the second meeting are adopted.

The **President** submits to the committee a letter which he has just received from his Excellency Mr. ESTEVA and reads aloud the following declaration contained therein:

> According to the instructions from its Government and in accord with its personal sentiments, the Mexican delegation declares that it cannot adhere to any convention in which all the States invited to the Peace Conference, large or small, strong or weak, are not considered as upon the most absolute and the most perfect footing of equality.
>
> In the present project anent an International Prize Court, the Mexican delegation does not find that just and desirable equality, and, in consequence, it will cast its vote against the project.

The first reading of the project relative to the establishment of an International Prize Court was terminated on August 17.

The **President** reminds the committee that it has still to adopt a resolution regarding the representation of the States in this court and to begin the discussion, in second reading, of the project in its new text[1] prepared by Mr. LOUIS RENAULT in which the latter has taken into account the remarks previously offered.

Upon the proposition of his Excellency Sir **Edward Fry,** the committee begins the reading of the articles.

PART I.—GENERAL PROVISIONS

ARTICLE 1

The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved.

(*Adopted.*)

[839]

ARTICLE 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

(*Adopted.*)

[1] Annex 92.

ARTICLE 3

The judgments of national prize courts may be brought before the International Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral Power or individual:

2. When the judgment affects enemy property and relates to:

(a) Cargo on board a neutral ship;

(b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(c) A claim based upon the fact that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

Upon a remark made by his Excellency Sir **Edward Fry,** the committee replaces the words *"upon the fact,"* in paragraph 2 *c.,* by *"upon the allegations."*

ARTICLE 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2 *b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b.*

(*Adopted.*)

ARTICLE 5

An appeal may also be brought by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled by the preceding article to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court.

The same appeal may be made by the neutral Power to whom the interested persons belong.

[840] Mr. **Louis Renault** states that this article is new and that it is meant to satisfy the remarks submitted by his Excellency Count TORNIELLI.

Mr. **Loeff** desires to fill in a gap in the phraseology. He states that Article 4, No. 2, grants to the Power under whose jurisdiction a private neutral individual comes, not only the right to act in his stead and place, but the right to forbid him access to the court. But Article 5 in its second paragraph refers to but one of these two rights.

The committee fully shares the view expressed by Mr. LOEFF and requests the Reporter to modify the phraseology of Article 5 so as to remove all doubt with regard to its real intentions.

The following articles are adopted without remarks:

ARTICLE 6

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

ARTICLE 7

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2 c, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

ARTICLE 8

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national court pronounces the capture to be null, the Court can only be asked to decide as to the damages.

ARTICLE 9

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

The following articles, which contain only changes of mere form, are adopted without remarks.

[841] PART II.—CONSTITUTION OF THE INTERNATIONAL PRIZE COURT

ARTICLE 10

The International Prize Court is composed of judges and deputy judges who will be appointed by the signatory Powers and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

ARTICLE 11

The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the appointment shall have been notified to the Administrative Council established by the Convention of July 29, 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 12

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointment (Article 11, paragraph 1), and if they sit by rota (Article 14, paragraph 2), according to the date on which they entered upon their duties. When the date is the same, the senior in age takes precedence. The deputy judges rank after the judges.

The judges and deputy judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the judges and deputy judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE 13

The Court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 14

The judges appointed by the following signatory Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other Powers sit by rota as shown in the table hereto annexed; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

Mr. **Louis Renault** (reporter) calls attention to the fact that this article makes it possible for a Power to appoint one and the same person as judge, then as deputy judge for another year. Likewise it authorizes several States to have one and the same person as their representative in the tribunal. The rules established in this matter in practice do not in any way make it necessary that the judge should belong to the nationality of the State which he represents.

[842] The committee then adopts Articles 15, 16, 17 and 18.

ARTICLE 15

If the belligerent Power has, according to the rota no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

ARTICLE 16

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge can, during his tenure of office, appear as agent or advocate before the International Prize Court nor act in any capacity whatever.

ARTICLE 17

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

ARTICLE 18

Every three years, the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

ARTICLE 19

The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of . . . . Netherland florins per diem.

These payments are included in the general expenses of the Court and are paid through the International Bureau established by the Convention of July 29, 1899.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

Mr. **Eyre Crowe** states that after having thought the matter over for a long time, the authors of the project came to adopt this principle: to the judges should be granted a sum which shall show that their charge is an honorary one and which shall not rouse the ambition of all jurists in all countries.

It is proper that it shall reasonably cover the expenses which the functions they may perform shall occasion to the judges; it is, therefore, desirable that it should be fixed for each day of service.

Mr. EYRE CROWE proposes the sum of one hundred florins per day.

This proposition is adopted.

[843] Upon a remark made by his Excellency Mr. **Mérey von Kapos-Mére,** the committee declares that it will be well to remember that, in the exercise of his functions, the deputy judge enjoys the same advantages and the same rights as the judge; and he requests the Reporter to be good enough to insert into the Convention a new article stating this principle once and for all.

ARTICLE 20

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure,* be transferred elsewhere without the consent of the belligerents.

(*Adopted.*)

ARTICLE 21

The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration.

(*Adopted.*)

ARTICLE 22

The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The necessary secretaries, translators and shorthand writers are appointed and sworn in by the Court.

Mr. **Loeff** observes that since Article 22 regulates the appointment of the secretaries, it would be proper not to refer to another mode of appointment in Article 39.

Mr. **Kriege** states that the reference in Article 39 is simply due to a printer's mistake.

ARTICLE 23

The Court decides on the choice of languages to be used by itself, and to be authorized for use before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

Upon a remark by Mr. **Heinrich Lammasch,** the committee adopts for paragraph 1 of this article the same phraseology as that admitted for commissions of inquiry.

Articles 24, 25 and 26 are adopted without remarks.

ARTICLE 24

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 25

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal
[844] or a high court of one of the signatory States, or a lawyer practicing before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

ARTICLE 26

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power applied to considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

PART III.—PROCEDURE IN THE INTERNATIONAL PRIZE COURT

ARTICLE 27

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at four months, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

His Excellency Sir **Edward Fry** prefers that the period should be indicated in days and not in months. This will prevent interested parties from every possibility of being mistaken.

After an exchange of views in this respect, the committee decides thenceforth to indicate the periods in days and not in months.

Articles 28 to 30 are then adopted.

ARTICLE 28

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 29

In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

[845]

ARTICLE 30

The Court officially notifies to the parties decrees or decisions made in their absence.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 31

If the appellant does not enter his appeal within the period laid down in Articles 27 or 29, it shall be rejected without further process.

Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within two months after the circumstances which prevented him entering it before it had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

Upon the proposition of the **President** the words "without further process" are replaced by "*without discussion.*"

ARTICLE 32

If the appeal is entered in time, a true copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

(*Adopted.*)

ARTICLE 33

If, in addition to the parties who are before the Court, there are other parties concerned having taken part in the trial before the national tribunals, the Court will await before dealing with the case the expiration of the period laid down in Articles 27 or 29.

His Excellency Mr. **Hammarskjöld** is of opinion that the phraseology of this article does not correctly translate the thought of the authors. For it is possible that certain interested parties may avail themselves of their right of recourse to the International Court without having taken part in the discussion in the first instance; one will recall indeed that the States are always entitled to act in the stead and place of those coming within their jurisdiction.

The inverse case might also arise; in case, for instance, it were an insurance company which pleaded in the first instance, it would not have the right of recourse before the international jurisdiction.

The committee requests the Reporter to meet, with a new phraseology, the very just criticism of his Excellency Mr. HAMMARSKJÖLD.

Articles 34 to 38 are then adopted.

ARTICLE 34

The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

[846] ARTICLE 35

After the close of the pleadings, a public sitting is held in which the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties or on its own initiative, in order that supplementary evidence may be obtained.

ARTICLE 36

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 26, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 37

The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 38

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

ARTICLE 39

The discussions take place in public subject to the right of a Power who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions which are written up by secretaries appointed by the president. These minutes alone have an authentic character.

Mr. **Louis Renault** proposes to express in the following terms the second paragraph of Article 39:

> Minutes are taken of these discussions signed by the president and registrar, and these minutes alone have an authentic character.

It is understood that the president is the one who has presided over the hearing, even though he were only a vice president.

This phraseology is approved.

Upon a remark of the **President**, Mr. LOUIS RENAULT is requested to prepare a new phraseology for Article 22 into which the word "registrar" is to be inserted. For it is necessary to avoid leaving any doubt as regards the veritable incumbent of these important functions.

No remarks accompany the reading of Articles 40, 41 and 42.

ARTICLE 40

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

[847]

ARTICLE 41

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements.

ARTICLE 42

The Court considers its decision in private and the proceedings remain secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 43

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

Here again upon a remark by Mr. **Loeff**, the committee demands a new phraseology in order to make it clear that the secretaries are the assistants of the recorder and might, if necessary, sign in his stead and place.

The **President** desires that greater precision be given to the special character of the secretaries in Article 22.

ARTICLE 44

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

(*Adopted.*)

ARTICLE 45

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

His Excellency Mr. **Choate** having asked as to the time when the value of the object in dispute is to be appreciated, Mr. **Louis Renault** states that it devolves upon the tribunal itself to settle this matter and that the decision of the court will fix definitively the amount of the value; the security, in consequence, will be only approximately fixed.

ARTICLE 46

The general expenses of the International Prize Court are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 14. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

[848] Mr. **Louis Renault** states that the text of this article has been modified. For it appeared legitimate that the Powers whose judges are to have the right to sit for a longer period than those of the other States, should also contribute in a larger measure to the general expenses of the court.

His Excellency Mr. **Hammarskjöld** asks if it would not be well to put in this article a reference to the table of the composition of the court which would be annexed to the Convention.

Mr. **Louis Renault** states that account will be taken of his observation in the drafting of the definitive text.

The **President** thinks that it would be well to state in paragraph 2 of Article 46 that the Administrative Council, which can hold no regular meetings in normal times, will, when unfortunately there arises the need of appealing to the court, meet prior to the latter and address itself immediately to the Powers to secure the necessary funds.

It is decided to secure, without the action of the committee, a phraseology in that sense.

ARTICLE 47

When the Court is not sitting, the duties conferred upon it by Article 34, paragraphs 2 and 3, and Article 45, paragraph 3, are discharged by a committee of three judges appointed by the Court. This committee decides by a majority of votes.

Mr. **Louis Renault** proposes to replace the word "*committee*" which has seemed unpleasant to several persons by that of "*commission.*"

(*Approval.*)

ARTICLE 48

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

(*Adopted.*)

ARTICLE 49

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

(*Adopted.*)

PART IV.—Final Provisions

Article 50

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A minute of the deposit of each ratification shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to all the signatory Powers.

(*Adopted.*)

[849] Article 51

The Convention shall come into force six months after its ratification. The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts within six months following the ratification; in this case, the period fixed in Article 27 or Article 29 shall only be reckoned from the date when the Convention comes into force.

The Convention shall remain in force for twelve years, and shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in effect in the relations between the other Powers.

(*Adopted.*)

Mr. **Loeff** feels that the new phraseology of paragraph 1 of this article contains a slight contradiction.

For it is therein stated that "the International Court shall have jurisdiction to deal with prize cases *decided* by the national courts within six months following the ratification," and this new provision is made applicable with regard to the periods, not only to the one mentioned in Article 27, which is quite proper and just, but also to that referred to in Article 29. Nevertheless, according to Article 6, the period referred to in Article 29, relates to matters *not decided* but that have extended over more than two years.

Therefore, it would be necessary to suppress the words "*or Article 29,*" or add after the words "*following the ratification*" the following words: "*or which shall have then extended over more than two years.*"

The former way of proceeding seems to him better, because in its original phraseology the text referred only to cases which had been decided.

The committee decides to suppress the words "*or Article 29.*"

The study of Article 14 is then taken up.

His Excellency Mr. **Ruy Barbosa** delivers the following address:

Permit me to revert to the matter of equity in the table of the distribution of the seats in the Prize Court. Those demanding justice must insist to the very last and until the last door is closed to them.

When on the basis of statistics I showed in the last meeting that the proposed apportionment is but a tissue of injustices in which, especially regarding Latin American countries, the positions indicated by their relative importance when compared with certain countries of Europe are almost always reversed, answer was made to me that the criterion of my statement was unsatisfactory; that I had but viewed the value of the merchant marine, and that there are other matters that must be taken into consideration: those of the importance of maritime commerce and of the military navy; that the authors of the project had sought in these as well the bases for their combination.

To this objection we have not hesitated to reply that if you deigned not to close the discussion, I would prove to you in the following sitting that the project would not withstand the test of these two touch-stones. The same whims of inequality would be found therein, no matter whether the adopted standard were that of the military navy or that of maritime commerce. In your
[850] wisdom, which I respect, you have not found it possible to hear my reasons. The debate in first reading has been closed.

But the second reading furnishes me the opportunity which I sought to acquit myself of my engagement. It is this I wish to do now by subjecting here the distribution of the project to the two indicated tests, one after the other.

According to the figures that are most reliable and lately published in an English review, *The Sphere,* of London, in the supplement for June 8, 1907, and which the Brazilian legation has had put before you, our maritime commerce, including both importation and exportation, was, in 1906, of 2,155,588,000 francs.

Now, in the proposed apportionment, Brazil is put in the fifth class. In the fourth class which immediately precedes, there appear Sweden, Turkey, Roumania, Norway, Denmark, Portugal and Greece.

But, see now the list in which they figure according to the importance of their maritime commerce. I got my information from the *Statesman's Year Book* for 1907 by converting the figures therein given in the monetary standards of other countries into the monetary unit of francs. It is well known that this source is most reliable: its information is usually correct.

Now, consider the little table that I have drawn up:

1	Brazil	2,155,588,025
2	Sweden (1905)	1,434,891,711
3	Turkey (1901)	1,077,022,200
4	Roumania (1905)	794,639,379
5	Norway	729,896,613
6	Denmark	563,755,000
7	Portugal	498,666,666
8	Greece	224,643,675

In consequence, with the exception of Belgium and China, my country has a considerable superiority over all those appearing in the fourth category and below which it has been decided to record it.

It is by 720,693,314 francs higher than Sweden. It is by 1,078,565,825 francs higher than Turkey. Its commerce is almost double that of the Ottoman commerce. It is almost thrice that of Roumania. It may be said also that it is thrice that of Norway. It is four times greater than that of Denmark. It is more than four times as large as Portuguese commerce. It is almost ten times more important than that of Greece which it exceeds by nearly two billion. Notice the difference. The maritime commerce of Brazil amounts to 2,155,000,000. That of Greece to 225,000,000. But Greece appears in the fourth rank and Brazil in the fifth.

The inversion also holds true with regard to the Argentine Republic and Mexico, whose maritime commerce is even more developed than that of Brazil. Chile would likewise have reason to complain of a similar inequality, though in

lesser degree. Her maritime commerce, in 1905 amounted to 850,885,500, that is to say, inferior to that of Sweden and the Ottoman Empire, but greater than that of Roumania, of Norway, of Denmark, of Portugal and of Greece; and yet, all these countries are included in the fourth class, whilst Chile was deemed
[851] worthy only of a place in the class below. So that the four nations relegated by the project to the fifth category exceed to a considerable extent, in so far as their maritime commerce is concerned, the most of those entered in the superior rank.

There remains for us only to examine the comparison of the project with regard to the project which ought to be adopted if these different States were considered from the point of view of their military navy. Emphasis has here been laid upon the authority of this criterion in the distribution of the places upon which it is said it ought to exercise great influence for the composition of a good prize court, because of the rôle, the responsibility and the rights of the military navy of each nation in the exercise of the right of seizure.

Well, let us look at it. In the first place, Belgium has no war navy. It is readily seen that this complete absence of one of the elements advanced as decisive in the selection should be compensated for by the great importance of her maritime commerce. But, as for the rest of the countries whose inferiority with regard to maritime commerce has already been mathematically established, this inferiority is not less with regard to the military navy.

Denmark's war navy is confined to coast protecting vessels. The rest of the States are: Sweden, Greece, Portugal, China, Norway and Roumania.

Consider now the comparative table between their war navy and that of Brazil, compared according to tonnage. I take my information from the source already mentioned:

Brazil	39,350
Sweden	22,228
Greece	15,000
Portugal	14,000
China	13,300
Norway	7,200
Roumania	1,910

That is to say, our military navy, although modest, is almost twice that of Sweden, twice that of Greece and of Portugal, three times as large as that of China, six times as large as Norway's and twenty times that of Roumania.

Still, Roumania, Norway, China, Portugal, Greece, Sweden and Denmark, all of which are far below us in a descending list, either with regard to war navy or maritime commerce, secure in the distribution according to the project, a category superior to ours.

What then, I will ask, is the criterion of the project, if it is neither that of maritime commerce, nor that of the war navy, nor that of the merchant navy?

One of our distinguished colleagues, it seems, would like to suggest another one, for in our last meeting he asked me point blank, how many Brazilian merchant vessels, within a period which his Excellency did not state, had been victims of the prize law. I interpreted his words in this way because I do not desire to see in them an intention to underrate us with an epigram.

But if the question had been seriously put to me, I would reply by asking our eminent colleague to tell us how many merchant vessels the law of capture has taken from Belgium. How many from Norway? How many from Sweden? How many from Portugal? How many from Roumania? And yet, with regard to the Prize Court, all these countries figure in a place higher than our own.

[852] In the next place, although it is true that in these latter times we have neither felt the effects of nor exercised maritime capture, it is not true that these rigors are altogether unknown to us.

Neither in 1864 and 1865 when we blockaded some Uruguayan points, nor subsequently when we enforced the blockade against Paraguay, did we make any maritime prizes. But from 1816 to 1820, many merchant vessels belonging to the then kingdom of Brazil were seized by armed corsairs at Baltimore and in other ports of the United States, by corsairs which had hoisted the flag of Artigas, the Dictator of Uruguay.

Many other merchant vessels of our country were likewise seized by corsairs of the same origin which flew the flag of the Republic of the United Provinces of Rio de la Plata. Some of the prizes were taken to ports of the United States where they were sold.

Our war navy, in those days, also seized merchant vessels of several nationalities. We have had to present and to accept many claims concerning maritime prizes. One of our most disagreeable diplomatic discussions was that which the Brazilian Chancellery was forced to carry on in 1827 with the chargé d'affaires of the United States of America, Mr. RAGUET, who called for and was given his passport.

My illustrious opponent will find the traces of this controversy in the great work of JOHN BASSETT MOORE, *Digest of International Law*, vol. iv, p. 707.

The American Government disapproved of the conduct of its representative to whom the Secretary of State, Mr. CLAY, in memorable dispatches, imparted a lesson in international politeness, by reminding the diplomat of his duty of not using offensive or irritating expressions towards the Brazilian Government:

> Provoking or irritating expressions ought always to be avoided.

It is to this magnanimous impartiality of the American spirit that we appeal. We also appeal to your impartiality, for certainly you are men with straight consciences, incapable of revolting against reason when it imposes itself with all the weight of its evidence. These flagrant inversions of rank are indefensible. It seems to us that they ought to be corrected. I dare say that it is our duty to correct them. I cannot but hope that we will do so, the more so because we do not call for the lowering of the States put above us, but only that we be not placed below those who are actually not superior to us.

I conclude, therefore, by claiming, both for Brazil, and for the other three countries put in the fifth class, that is to say, Argentina, Mexico and Chile, that they be raised at least to the same plane on which are found Norway, Turkey, Roumania, Denmark, Portugal, Greece.

If you do not do so it will undoubtedly be a case of denial of justice.

His Excellency Sir **Edward Fry** calls for an immediate vote upon the table on the opposite page dealing with the distribution of judges and deputy judges by countries, for each year of the period of six years.

[853] Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Six Years

	Judges	Deputy Judges	Judges	Deputy Judges
	First year		*Second year*	
1	Argentine Rep.	Paraguay	Argentine Rep.	Panama
2	Colombia	Bolivia	Spain	Spain
3	Spain	Spain	Greece	Roumania
4	Greece	Roumania	Norway	Sweden
5	Norway	Sweden	Netherlands	Belgium
6	The Netherlands	Belgium	Turkey	Luxemburg
7	Turkey	Persia	Uruguay	Costa Rica
	Third year		*Fourth year*	
1	Brazil	Dominican Rep.	Brazil	Guatemala
2	China	Turkey	China	Turkey
3	Spain	Portugal	Spain	Portugal
4	Netherlands	Switzerland	Peru	Honduras
5	Roumania	Greece	Roumania	Greece
6	Sweden	Denmark	Sweden	Denmark
7	Venezuela	Haiti	Switzerland	Netherlands
	Fifth year		*Sixth year*	
1	Belgium	Netherlands	Belgium	Netherlands
2	Bulgaria	Montenegro	Chile	Salvador
3	Chile	Nicaragua	Denmark	Norway
4	Denmark	Norway	Mexico	Ecuador
5	Mexico	Cuba	Portugal	Spain
6	Persia	China	Serbia	Bulgaria
7	Portugal	Spain	Siam	China

[854] Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Six Years

	Judges	Deputy Judges	Judges	Deputy Judges
	First year		*Second year*	
1	Germany	Germany	Germany	Germany
2	United States of America	United States of America	United States of America	United States of America
3	Argentine Rep.	Paraguay	Argentine Rep.	Panama
4	Austria-Hungary	Austria-Hungary	Austria-Hungary	Austria-Hungary
5	Colombia	Bolivia	Spain	Spain
6	Spain	Spain	France	France
7	France	France	Great Britain	Great Britain
8	Great Britain	Great Britain	Greece	Roumania
9	Greece	Roumania	Italy	Italy
10	Italy	Italy	Japan	Japan
11	Japan	Japan	Norway	Sweden
12	Norway	Sweden	Netherlands	Belgium
13	Netherlands	Belgium	Russia	Russia
14	Russia	Russia	Turkey	Luxemburg
15	Turkey	Persia	Uruguay	Costa Rica

	Judges	Deputy Judges	Judges	Deputy Judges
	Third year		*Fourth year*	
1	Germany	Germany	Germany	Germany
2	United States of America	United States of America	United States of America	United States of America
3	Austria-Hungary	Austria-Hungary	Austria-Hungary	Austria-Hungary
4	Brazil	Dominican Rep.	Brazil	Guatemala
5	China	Turkey	China	Turkey
6	Spain	Portugal	Spain	Portugal
7	France	France	France	France
8	Great Britain	Great Britain	Great Britain	Great Britain
9	Italy	Italy	Italy	Italy
10	Japan	Japan	Japan	Japan
11	Netherlands	Switzerland	Peru	Honduras
12	Roumania	Greece	Roumania	Greece
13	Russia	Russia	Russia	Russia
14	Sweden	Denmark	Sweden	Denmark
15	Venezuela	Haiti	Switzerland	Netherlands
	Fifth year		*Sixth year*	
1	Germany	Germany	Germany	Germany
2	United States of America	United States of America	United States of America	United States of America
3	Austria-Hungary	Austria-Hungary	Austria-Hungary	Austria-Hungary
4	Belgium	Netherlands	Belgium	Netherlands
5	Bulgaria	Montenegro	Chile	Salvador
6	Chile	Nicaragua	Denmark	Norway
7	Denmark	Norway	France	France
8	France	France	Great Britain	Great Britain
9	Great Britain	Great Britain	Italy	Italy
10	Italy	Italy	Japan	Japan
11	Japan	Japan	Mexico	Ecuador
12	Mexico	Cuba	Portugal	Spain
13	Persia	China	Russia	Russia
14	Portugal	Spain	Serbia	Bulgaria
15	Russia	Russia	Siam	China

The **President** puts the whole of this table to a vote.

It is accepted by ten votes against one.

Article 14 is likewise adopted in as much as it gave rise to no objection.

[856] The committee decides not to meet to listen to the reading of the report of Mr. Louis Renault; it relies entirely upon its reporter for this work which will be read next week in plenary Commission.

His Excellency Mr. **Hagerup** would still desire to state, but without expecting any discussion to follow, that in his opinion, it would be well to stipulate in Article 15, that the outgoing judges must be taken from those enumerated in the first paragraph of Article 4, so as not to further strengthen, in the court, the element "captor" and weaken the element "captured."

The meeting closes at 12:15 o'clock.

ANNEXES

[859]

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Annex 1

PROPOSITION OF THE FRENCH DELEGATION

Draft intended to replace Part III of the Convention of July 29, 1899, for the pacific settlement of international disputes (Articles 9 to 14)

(Commissions of Inquiry)

ARTICLE 1

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it expedient that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 2

International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed, as well as the mode and time of designation of the assessors if there are any; the extent of the powers of the commissioners and of the assessors; the place where the commission shall meet and whether it may remove to another place if there is need; the forms and procedure to be followed, and, generally speaking, all the conditions upon which the parties have agreed.

ARTICLE 3

Unless otherwise stipulated, international commissions of inquiry shall be formed in the manner determined by Articles 32 and 34 of the present Convention.

ARTICLE 4

In case of the death, retirement or disability from any cause of one of the commissioners or assessors, his place is filled in the same way as he was appointed.

ARTICLE 5

The parties designate the place of sitting of the commission, and this cannot be altered except with their assent.

[860] However, the commission is entitled to move temporarily to the situs of the controversy, if it is not already there, or to send thither one or more of its members.

ARTICLE 6

The commission decides on the choice of languages to be used by itself, and to be authorized for use before it.

ARTICLE 7

The commission is entitled to settle the rules of procedure for the prosecution of the inquiry and to arrange all the formalities required for dealing with the evidence, in conformity with the provisions of the special inquiry convention.

ARTICLE 8

The parties are entitled to appoint delegates or special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates appointed by themselves, to defend their rights and interests before the commission.

The commission as well as the adverse party should be notified of the names of the agents and counsel designated by each party.

ARTICLE 9

A secretary general acts as registrar for the international commission of inquiry. He is named by it.

It is his duty under the control of the president to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and have charge of the archives while the inquiry lasts.

He provides the necessary stenographer and translators.

ARTICLE 10

The sittings of the commission are not public, nor are the minutes and documents connected with the inquiry published, except in virtue of a decision of the commission taken with the consent of the parties.

ARTICLE 11

On the inquiry both sides must be heard.

In the manner and time fixed by the commission, the parties communicate to the commission and to the other party all instruments, papers and documents which they consider useful for ascertaining the truth, as well as the list of witnesses whose evidence it wishes to be heard.

ARTICLE 12

Every investigation, every examination of a locality must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 13

The commission is entitled to ask from either party such explanations and information as it deems expedient. In case of refusal, the commission shall take note thereof.

[861] ARTICLE 14

The litigant Powers undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

ARTICLE 15

The agents are authorized, in the course of the inquiry, to present in writing to the commission and to the other party such statements and requisitions, as they consider useful for ascertaining the truth.

ARTICLE 16

The witnesses are subpœnaed on the request of the parties or by the commission of its own motion.

They are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

No witness can be heard more than once upon the same facts, if it is not for the purpose of being confronted by another witness whose statement would contradict his own.

ARTICLE 17

The examination of witnesses is conducted by the president.

The members of the commission may, however, ask the witness questions which they consider proper to throw light upon or complete his evidence, or to inform themselves on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

ARTICLE 18

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

ARTICLE 19

A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks well, which shall be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is required to sign it.

ARTICLE 20

After the parties have presented all the explanations and evidence, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

ARTICLE 21

The commission considers its decision in private.

All questions are decided by a majority of the members of the commission.

[862] If a member declines to vote, the fact must be recorded in the minutes.

ARTICLE 22

The report of the international commission of inquiry is adopted by a majority vote and signed by all the members of the commission.

ARTICLE 23

The report of the international commission of inquiry is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is delivered to each party.

ARTICLE 24

The report of the international commission of inquiry is limited to a finding of facts, and has in no way the character of an award. It leaves to the litigant Powers entire freedom as to the effect to be given to this finding.

ARTICLE 25

Each party pays its own expenses and an equal share of the expenses incurred by the commission.

Annex 2

PROPOSITION OF THE RUSSIAN DELEGATION

Draft intended to replace Part III of the Convention of July 29, 1899, for the pacific settlement of international disputes.

PART III

International Commissions of Inquiry

ARTICLE 9

In disputes of an international nature involving neither honor nor independence, and arising from a difference of opinion on points of fact, the signatory Powers agree to institute, if circumstances allow, a commission of inquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation, and establishing, if necessary, responsibility therefor.

ARTICLE 10

The international commission of inquiry is constituted by special agreement between the parties in dispute setting forth their agreement to have recourse thereto, and to conform, so far as procedure is concerned, to the following rules.

[863] ARTICLE 11

In the above case the commission is constituted in the following manner:

Each litigant party shall name one member. For the selection of the third, who shall be the president of the commission, the litigant parties shall address a neutral Power or the Administrative Council of the Permanent Court of Arbitration.

The neutral Power and the Administrative Council shall, as a general rule, choose the third commissioner from the list of the members of the Permanent Court of Arbitration.

ARTICLE 12

Each party shall be represented before the commission by an agent who shall act as intermediary between it and the Government which has named him.

The appointment of counsel for the defence of their interests is left to the judgment of the parties.

ARTICLE 13

The commission shall be formed within two weeks after the date of the incident which caused its formation. It shall sit, so far as possible, in the place where the incident occurred.

ARTICLE 14

The commission shall itself establish the rules of procedure within the shortest possible time.

However, the following rules will serve as principles to be followed:

1. All decisions shall be made by majority vote.

2. The president shall control the inquiry, in which both sides must be heard. However, the commissioners and the agents have the right to take part in the examination of the case.

3. The inquiry begins with the communication to the members of the commission by the respective agents of all documents relating to their cause.

4. Each party may freely summon witnesses up to the close of the examination. After this a witness cannot be heard except with the consent of the opposite party or the sanction of the commission.

5. Witnesses who have not appeared before the commission can give their testimony before the competent authorities of their countries. Written depositions shall not be accepted except as documents.

6. No arguments or statements of conclusions shall be had before the commission.

7. The report is drawn up by the commissioners in secret session without participation by the agents.

8. The report shall have the character of the finding of an examiner and in nowise that of an arbitral award. It should be limited to a statement of facts and responsibility.

9. The report is signed by all of the members of the commission of inquiry. It does not contain the opinion of the minority.

Upon the reading of the report the labors of the international commission of inquiry are concluded.

[864] ARTICLE 15 *(formerly Article 12)*

The litigant Powers undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

ARTICLE 16 *(formerly Article 13)*

The international commission of inquiry presents its report to the litigant Powers.

ARTICLE 17

The Powers in litigation, having taken note of the statement of facts and responsibility pronounced by the international commission of inquiry, are free either to conclude a friendly settlement, or to resort to the Permanent Court of Arbitration at The Hague.

Annex 3

PROPOSITION OF THE ITALIAN DELEGATION

I

Add to Article 10 of the Russian proposition (Annex 2) and to Article 2 of the French proposition (Annex 1):

"All rules to be followed by international commissions of inquiry, so far as they are not determined by the special convention between the parties, are fixed by the commission itself. However, the adoption of the provisions contained in the present set of rules is recommended to commissions to facilitate their task."

II

Amendment to Article 13 of the Convention:

Add to Article 13:

"If one of the parties refuses to sign, the fact shall be mentioned, and the report shall be equally valid if it is signed by an absolute majority."

[865]

Annex 4

PROPOSITION OF THE NETHERLAND DELEGATION

The Netherland delegation has the honor to propose the following modifications:

In Article 9 of the Hague Convention of July 29, 1899, for the peaceful settlement of international disputes:

Replace the words *"deem it expedient"* by the word *"agree."*

In the French proposition (Annex 1):

Insert in Article 2 after the words *"to be followed,"* the words *"the languages which it shall use and those the use of which shall be authorized before it."*

Omit Article 6.

Add to Article 7 the words:

"and of the present convention."

Omit the last paragraph of Article 16.

Add after Article 24, a new article as follows:

"It is of course understood that Articles 8-13 and 15-21 are applicable to procedure before the commission of inquiry only in so far as the parties have not agreed upon other rules in the special inquiry convention."

Annex 5

PROPOSITION OF THE BRITISH DELEGATION

Draft intended to replace Part III of the Convention of July 29, 1899

PART III.—*International commissions of inquiry*

ARTICLE 1

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it expedient that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 2

International commissions of inquiry are constituted by special agreement between the parties in dispute.

[866]

ARTICLE 3

The convention states the agreement of the parties to have recourse to the inquiry, it defines the facts to be examined and the extent of the powers of the commissioners, if necessary it fixes the date for the presentation of the statement of facts by each party, and of the documents relating to the dispute, and determines the modifications which the parties consider it wise to make to the procedure provided in Articles 11 to 23.

ARTICLE 4

1. International commissions of inquiry are formed, unless otherwise stipulated, in the manner determined by Articles 32 and 34 of the present Convention.

2. In case of the death, retirement or disability from any cause of one of the commissioners, his place is filled in the same way as he was appointed.

ARTICLE 5

The Powers in dispute undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

ARTICLE 6

Within a period fixed by the inquiry convention each party shall present to the commissioners and to the other party to the dispute a statement of the facts and all the documents relating to the cause.

ARTICLE 7

On the inquiry both sides shall be heard.

ARTICLE 8

The international commission of inquiry presents its report, signed by all the members of the commission, to the Powers in dispute.

ARTICLE 9

The report of the commission is limited to a finding of facts, and has in no way the character of an award. It leaves to the parties in dispute entire freedom as to the effect to be given to this finding.

ARTICLE 10

If no special inquiry convention is made, the following rules shall be applicable to procedure before the commission.

ARTICLE 11

The meeting-place of the commission is designated by the parties. In default of such designation, the commission shall sit at The Hague.

The place of sitting thus fixed cannot be altered by the commission without the consent of the parties, except in the case of *force majeure*.

ARTICLE 12

The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and is authorized to place its offices and staff at the disposal of the signatories for the use of the commission of inquiry.

[867] ARTICLE 13

The parties are entitled to appoint delegates or special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates appointed by themselves, to defend their rights and interests before the commission.

The commission as well as the adverse party should be notified of the names of the agents and counsel designated by each party.

ARTICLE 14

The commission decides on the choice of languages to be used by itself, and to be authorized for use before it.

ARTICLE 15

All of the commission's decisions are made by a majority vote.

ARTICLE 16

The president shall control the inquiry. However, the commissioners, the agents and the counsel have the right to take part in the examination of the case.

ARTICLE 17

The witnesses are subpœnaed on the request of the parties or by the commission of its own motion up to the close of the examination. After this no witness can be heard without the consent of the adverse party or the sanction of the commission.

The witnesses are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

ARTICLE 18

Witnesses who have not appeared before the commission may give their testimony before the competent authorities of their countries. Written depositions shall not be accepted except as documents.

ARTICLE 19

When the commissioners have exhausted all the sources of information, each of the agents has the right to set forth in writing the conclusions and observations which he desires to submit to the commission. These conclusions and observations are read by the agents.

ARTICLE 20

The meetings of the commission shall be public when the agents present their statements of fact, the witnesses are examined, and the agents present their conclusions, and the final meeting when the commission makes known the result of its deliberations. The other meetings of the commission are not public.

ARTICLE 21

The report is drawn up by the commissioners in secret session without the participation of the agents; it is signed by all the commissioners and does not contain the opinion of the minority.

ARTICLE 22

The commission shall itself establish the details of procedure which are not provided for in the inquiry convention or the above rules.

ARTICLE 23

Each party pays its own expenses and an equal share of the expenses incurred by the commission.

[868]

Annex 6

PROPOSITION OF THE HAITIAN DELEGATION

The Haitian delegation requests permission to call the kindly attention of the Second Peace Conference to the following points of the Arbitration Convention of 1899.

Special Mediation

It has seemed to it—and it submits its point of view without pretending to utter anything new—that special mediation as provided in Article 8 of the Convention of 1899 would have more chance of amounting to something if, instead of being confided to two Powers, it should be conferred upon a single State chosen under such conditions as to ensure its absolute impartiality. In the system provided in Article 8, each nation engaged in the conflict selects one Power, and the two Powers thus chosen by the interested parties must endeavor to prevent a breach of peaceful relations. The Haitian delegation has asked itself whether, even unwittingly perhaps, the Powers charged with mediation might not have a certain tendency and consider themselves bound to present first and foremost and in the best light possible the cause of the States which have chosen them. It is to be feared that, as has happened only too often in cases of arbitration under a *compromis,* the mediating Powers may exhaust their efforts to discover primarily the least disadvantageous solution for their respective clients. There being no other Power to separate them, they have less chance of reaching an agreement, and their disagreement would run the risk of grave consequences by leaving the litigant parties under the impression that they are not entirely in the wrong.

Would it not be advantageous at the beginning of a dispute likely to endanger the peace to confer the rôle of mediator upon a State having no prejudice whatever? The Haitian delegation takes the liberty of proposing that the two Powers designated by the litigant parties shall have the right only to choose a third Power which shall be the real mediator. This third Power will more easily make the interested parties listen to reason because it does not derive its authority direct from them; at least its word will be less open to suspicion.

The Haitian delegation therefore has the honor to propose a redraft of Article 8 as follows:

> The signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:
>
> In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power on the other side, with the object of naming the mediator empowered to prevent the rupture of peaceful relations.
>
> For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Power, which must use its best efforts to settle it.

In case of a definite rupture of peaceful relations, the three Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

[869]

THE POWER TO SUGGEST THE FORMATION OF INTERNATIONAL COMMISSIONS OF INQUIRY

The extension given to arbitration can but strengthen the cause of peace. Likewise the Haitian delegation begs to call the attention of this august Conference to the opportunity of according third Powers the right to suggest, if necessary, the formation of the international commission of inquiry provided for in Article 9 of the Convention of 1899.

The two States involved may, from reasons of great personal convenience, hesitate to take the initiative in this matter; and a suggestion in this regard by a Power having no immediate interest in the controversy, would doubtless facilitate resort to an inquiry. Besides, Article 27 of the Convention of 1899 authorizes the signatory States to call the attention of the Powers in dispute to the fact that the Permanent Court is open to them.

There can therefore be no serious objection to granting to the nations disposed to offer their good offices or mediation the same power with regard to the organization of international commissions of inquiry.

With the benefit of these remarks the Haitian delegation takes the liberty of proposing the addition to Article 9 of the following paragraph:

The signatory Powers may also suggest to parties in dispute recourse to international commissions of inquiry.

Annex 7

THE PROPOSITION OF THE BRITISH AND FRENCH DELEGATIONS

Draft intended to replace Part III of the Convention of July 29, 1899, for the pacific settlement of international disputes (Articles 9 to 14)

(Commissions of Inquiry)

ARTICLE 1

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it expedient that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 2

International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined, it determines the mode and time in which the commission is to be formed, as well as the
[870] designation of the assessors, if there are any; the extent of the powers of the commissioners and of the assessors; the place where the commission shall meet, and, upon occasion, whether it may remove to another place; and, if necessary, the date on which each party must present a statement of facts and, generally speaking, all the conditions upon which the parties have agreed.

ARTICLE 3

In order to facilitate the constitution and operation of international commissions of inquiry, the signatory Powers have adopted the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not agree upon other rules.

ARTICLE 4

Unless otherwise stipulated, international commissions of inquiry shall be formed in the manner determined by Articles 32 and 34 of the present Convention.

ARTICLE 5

In case of the death, retirement or disability from any cause of one of the commissioners or assessors, his place is filled in the same way as he was appointed.

ARTICLE 6

The parties designate the place of sitting of the commission. If it is not so determined the commission shall sit at The Hague. The place of sitting thus fixed cannot be altered by the commission except with the assent of the parties.

ARTICLE 7

The commission decides on the choice of languages to be used by itself, and to be authorized for us before it.

ARTICLE 8

The commission shall settle the details of the procedure not covered by the special inquiry convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence.

ARTICLE 9

The parties are entitled to appoint delegates or special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to defend their rights and interests before the commission.

The commission as well as the adverse party should be notified of the names of the agents and counsel designated by each party.

ARTICLE 10

The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and is authorized to place its offices and staff at the disposal of the signatory States for the use of the commission of inquiry.

ARTICLE 11

If the commission meets elsewhere than at The Hague a secretary general, acting as registrar for the commission, shall be named by it.

[871] It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and for the custody of the archives while the inquiry lasts.

He provides the necessary stenographers and translators.

ARTICLE 12

The sittings of the commission are not public, nor the minutes and documents connected with the inquiry published, except by virtue of a decision of the commission taken with the consent of the parties.

ARTICLE 13

On the inquiry both sides must be heard.

At the dates fixed, the parties communicate to the commission and to the other party the statements of fact, if any, and in all cases, the instruments, papers and documents which they consider useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence they wish to be heard.

ARTICLE 14

Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 15

The commission is entitled to ask from either party such explanations and information as it considers necessary.

In case of refusal the commission takes note thereof.

ARTICLE 16

The litigant Powers undertake to supply the commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

To ensure the summoning of witnesses or experts or the hearing of their testimony if they are unable to appear before the commission, each of the contracting parties, at the request of the commission, will lend its assistance and arrange for their evidence to be taken before the qualified officials of their own country.

ARTICLE 17

The agents are authorized in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or conclusions as they consider useful for ascertaining the truth.

ARTICLE 18

The witnesses are subpœnaed on the request of the parties or by the commission of its own motion.

They are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

No witness can be heard more than once upon the same facts, if it is not for the purpose of being confronted by another witness whose statement would contradict his own.

ARTICLE 19

The examination of witnesses is conducted by the president.

The members of the commission may, however, ask the witness questions which they consider proper to throw light upon or complete his evidence,
[872] or to inform themselves on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

ARTICLE 20

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

ARTICLE 21

A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks well, which shall be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is required to sign it.

ARTICLE 22

After the parties have presented all the explanations and evidence, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

ARTICLE 23

The commission considers its decision in private.

All questions are decided by a majority of the members of the commission.

If a member declines to vote, the fact must be recorded in the minutes.

ARTICLE 24

The report of the international commission of inquiry is adopted by a majority vote and signed by all the members of the commission.

If one of the members refuses to sign, the fact is mentioned, the report being valid if adopted by a majority.

ARTICLE 25

The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is given to each party.

ARTICLE 26

The report of the international commission of inquiry is limited to a finding of facts, and has in no way the character of an award. It leaves to the litigant Powers entire freedom as to the effect to be given to this finding.

ARTICLE 27

Each party pays its own expenses and an equal share of the expenses of the commission.

[873]

PART IV OF THE CONVENTION OF JULY 29, 1899, FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Annex 8

PROPOSITION OF THE GERMAN DELEGATION

Project of three new articles to be inserted in the Convention for the pacific settlement of international disputes, of July 29, 1899

ARTICLE 31 *a*

If the signatory Powers have agreed among themselves upon obligatory arbitration which contemplates a *compromis* for each dispute, each one of them shall, in default of contrary stipulations, resort to the intervention of the Permanent Court of Arbitration at The Hague with a view to establishing such a *compromis* in case it has not succeeded in bringing about an agreement upon this subject.

Such recourse will not take place, if the other Power declares that in its opinion the dispute is not included within the category of questions to be submitted to obligatory arbitration.

ARTICLE 31 *b*

In case of a resort to the Permanent Court at The Hague (see Article 31 *a*) the *compromis* shall be settled by a commission composed of five members designated in the following manner:

During the four weeks which follow the recourse, each of the two parties shall select one of the members of the Permanent Court and also approach one of the disinterested Powers so that the latter may, in its turn, choose another member within the four remaining weeks, from among the members of the Permanent Court which have been appointed by it. Within a further period of four weeks the two disinterested Powers shall jointly approach a third disinterested Power, which shall be designated, if necessary, by lot, so that it may choose, within the four following weeks, the fifth member from among the members of the Permanent Court which were named by it.

The commission shall elect its president by an absolute majority of votes among the members chosen by the disinterested Powers. If necessary, they shall cast ballots.

ARTICLE 34 *a*

In case of the establishment of a *compromis* by a commission, such as is provided for in Articles 31 *a* and 31 *b*, the members of the commission chosen by the three disinterested Powers shall form the arbitral tribunal.

[874]

Annex 9

PROPOSITION OF THE FRENCH DELEGATION

Draft of plan to supplement the Hague Convention of July 29, 1899, for the pacific settlement of international disputes

(Arbitration by Summary Procedure)

General provision

ARTICLE 1

The system here given is drawn up solely with a view to facilitate the operation of the Hague Convention so far as it concerns certain disputes; as to points not covered by it, reference is had to the provisions of the Convention of 1899 so far as they would not be contrary to the principles of the rules here given.

Organization of tribunal

ARTICLE 2

Each of the parties in dispute shall call upon a qualified person from among its own *ressortissants* to assume the duties of arbitrator. The two arbitrators thus selected shall choose an umpire. If they do not agree on this point, each of them shall propose a candidate, not a *ressortissant* of any of the parties, taken from the general list drawn up in accordance with the Hague Convention of 1899; which of the candidates thus proposed shall be the umpire shall be determined by lot.

The umpire presides over the tribunal, which gives its decision by a majority vote.

If one party so requests, each of the parties shall appoint two arbitrators in place of one, and the four arbitrators shall proceed to designate the umpire in the manner above indicated.

Meeting-place of the tribunal

ARTICLE 3

In the absence of an agreement concerning the meeting-place of the arbitral tribunal this place shall be determined by lot, each party proposing a given city.

The Government of the country where the tribunal is to meet shall place at its disposition the staff and offices necessary for its operation.

Procedure

ARTICLE 4

When the tribunal has been formed according to the first article, it shall meet and settle the time within which the two parties must submit their respective cases to it.

ARTICLE 5

Each party shall be represented before the tribunal by an agent, who shall serve as intermediary between the tribunal and the Government which appointed him.

ARTICLE 6

The proceedings shall be conducted exclusively in writing. Each party, however, shall be entitled to ask that witnesses be heard. The tribunal shall, on its part, have the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses, whose appearance in court it shall consider useful.

[875] In order to ensure the summoning or hearing of these experts or witnesses, each of the contracting parties, at the request of the tribunal, shall lend its assistance under the same conditions as for the execution of letters rogatory.

ARTICLE 7

If the dispute relates to the interpretation or application of a convention between more than two States, the parties between which it has arisen shall notify the other contracting parties of their intention to resort to arbitration and advise them of the arbitrators chosen by them.

The parties thus notified shall have the right to name arbitrators to form the tribunal in addition to the arbitrators designated by the Powers which have made the notification. If, within a month after this notification, any party has not designated an arbitrator of its choice, that Power will be understood to accept any decision which may be rendered.

The umpire shall be designated as indicated by Article 1, except that where there are more than five parties to the dispute, the restrictive clause relating to the nationality of the umpire shall not be applied. The umpire shall have the deciding vote in case of an equal division.

Expenses

ARTICLE 8

The expenses of the arbitration shall be borne equally by the parties to the dispute.

Annex 10

PROPOSITION OF THE RUSSIAN DELEGATION

PART IV.—INTERNATIONAL ARBITRATION

CHAPTER II.—*The Permanent Court of Arbitration*

ARTICLE 32

(*Vœu of 1902.*)

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are clearly defined the subject of the dispute, the extent of the

arbitrators' powers as well as the amount of money which the two parties in dispute have agreed to place immediately at the disposal of the International Bureau to cover the necessary expenses for the progress of the arbitration.

The *compromis* always implies the engagement of the parties to submit in good faith to the arbitral award.

ARTICLE 23

The litigant Powers which have agreed to submit their dispute to the Permanent Court of Arbitration agree to communicate this act immediately after the signature of the *compromis* to the International Bureau, asking the latter to take the necessary measures for the establishment of the arbitral tribunal.

[876] After the choice of the arbitrators these same Powers shall communicate their names without delay to the International Bureau which, for its part, is obliged to communicate without delay to the arbitrators named the *compromis* which has been signed and the names of the members of the arbitral tribunal which has been established.

Add to original Article 23 after the words:

> "The members of the Court are appointed for a term of six years. Their appointments can be renewed," the following: "the members of the Permanent Court of Arbitration have not the right to plead before the Court as counsel or advocates for the States in dispute, nor to act as agents."

Annex 11

PROPOSITION OF THE RUSSIAN DELEGATION

PART IV.—INTERNATIONAL ARBITRATION

CHAPTER III.—*Arbitration procedure*

ARTICLE 34

The tribunal appoints its own president.

By common agreement the umpire acts as president.

ARTICLE 38

(*Vœu of 1902.*)

The parties in dispute agree to determine in advance in the *compromis* the language of the arbitration procedure before the tribunal.

The arbitrators, agents and counsel are obliged to submit to this decision and not to employ any other than the official language chosen by the Powers for the special case.

ARTICLE 41

(*Vœu of 1902.*)

During the pleadings the parties are obliged to communicate to the members of the arbitral tribunal, directly or through the International Bureau, all their instruments and documents.

After the meeting of the tribunal the latter shall immediately proceed to the discussions during which the presentation of new documents or written instruments on the part of the parties to the dispute shall not be permitted except in the case of actual *force majeure* and of absolutely unforeseen circumstances.

After the close of the debates no communication of new acts or written instruments can be made.

ARTICLE 55

Article 55 of the Convention of 1899 should be omitted.

[877]

Annex 12

PROPOSITION OF THE GERMAN DELEGATION

Amendments to the Provisions of the Hague Arbitration Convention of July 29, 1899

ARTICLE 22 (*paragraph 4*)

Insert after the words "*at The Hague*" the words "*as soon as possible.*"

ARTICLE 24 (*paragraph 6*)

Insert after the words "*to the Bureau*" the words "*as soon as possible.*"

ARTICLE 37 (*new paragraph*)

The members of the Permanent Court may not act as delegates, agents, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 38 (*revised*)

The *compromis* shall designate the languages to be used by the tribunal and to be authorized for use before it.

ARTICLE 39 (*paragraph 2, revision of the second sentence*)

The *compromis* shall determine the form and the time in which this communication shall be made.

NEW ARTICLE 40 *a*

The tribunal shall not meet until the close of the pleadings.

NEW ARTICLE (*replacing* ARTICLES 42 *and* 43)

After the close of the pleadings, the tribunal shall refuse discussion of all new papers or documents to which the agents or counsel of the parties may call its attention.

The tribunal shall, however, take into consideration all new papers or documents which both parties shall agree to produce, or the production of which

could not be made sooner by reason of *force majeure* or unforeseen circumstances. The tribunal shall decide, in case of doubt, the question of whether these conditions are fulfilled.

ARTICLE 49

Strike out the second clause: "*to decide . . . conclude its arguments.*"

NEW ARTICLE 51 *a*

If the decision requires some act in execution thereof, the arbitral sentence shall fix a period within which execution must be completed.

ARTICLE 57 (*new paragraph*)

The *compromis* shall fix a sum which each party must deposit before the opening of the case, as an advance to cover the expenses of the tribunal.

[878]

Annex 13

PROPOSITION OF THE DELEGATION OF THE ARGENTINE REPUBLIC

Project of the declaration concerning international arbitration

DECLARATION

The Second Peace Conference expresses the *vœu* that the sovereigns or heads of States as well as the officials and scientific bodies of the countries which adhered to the Convention for the pacific settlement of international disputes should not accept the duties of arbitrator to settle differences between the signatory Powers until after a prior declaration by the interested parties that they have not been able to agree upon the organization of a tribunal formed by members of the Permanent Court of Arbitration.

Annex 14

PROPOSITION OF THE DELEGATION OF ITALY

I [1]

II

Amendment to Article 52 of the Convention:
Add:

If one of the members refuses to sign, the fact shall be mentioned, and the report shall be equally valid if it is signed by an absolute majority.

[1] See annex 3.

III

New Article 52 *a*

Any dispute arising between the parties as to the interpretation and execution of the arbitral award, shall be submitted to the decision of the tribunal which pronounced it.

[879]

Annex 15

PROPOSITION OF THE PERUVIAN DELEGATION

Amendment to Article 27 of the Convention of July 29, 1899

Add to Article 27 of the Convention for the pacific settlement of international disputes, July 29, 1899, Article 27 *bis*, in these terms:

In case of dispute between two Powers, one of them may always address to the International Bureau at The Hague a note containing a declaration that it would be ready to submit the dispute to arbitration.

This note shall make known briefly the point of view of the Power making it with regard to the dispute, and the claim set up by that Power.

The International Bureau must inform the other Power of the declaration which it has received, and it should place itself at the disposition of both Powers to facilitate any exchange of views between them which may lead to the conclusion of a *compromis*.

Annex 16

PROPOSITION OF THE CHILEAN DELEGATION

Amendment to the Peruvian Proposition [1]

ARTICLE 27 *bis*

In case a dispute, not arising from facts existing before the present Convention, should break out between two Powers, one of them may always address to the International Bureau at The Hague (if necessary by telegraph) a declaration making known its willingness to submit the difference to arbitration.

The International Bureau shall at once notify the interested Government of this declaration. It shall also send notice thereof, together with the reply made thereto, to the signatory Governments to the present Convention.

[1] Annex 15.

[880]

Annex 17

PROPOSITION OF THE DELEGATION OF AUSTRIA-HUNGARY

Amendment to Article 32 of the Convention of July 29, 1899

ARTICLE 32

Add to this article a new paragraph thus worded:

> In case the tribunal is composed of but three arbitrators, the members of the Permanent Court named by the litigant parties as also the *ressortissants* of these last cannot become members of the tribunal.
>
> If, on the other hand, the tribunal is formed of five members, each party shall be free to choose as arbitrator either one of the persons designated by it as a member of the Permanent Court, or one of its *ressortissants*.

The insertion of such a clause is to be recommended with the view of assuring the impartiality of the tribunal. For, if the tribunal is formed of but three members of which two would be *ressortissants* of the litigant parties or named by these last as members of the Permanent Court, the arbitral decision would really be placed in the hands of the umpire who would act, in a way, as sole judge, the national arbitrators of the parties or those named by them very often being brought to act in favor of the State of which they are *ressortissants* or which has designated them.

Also, experience has proved that, whereas the awards of arbitral tribunals, when they have not been composed of the nationals of the parties, have been unanimously agreed upon, this unanimity has been wanting in contrary cases.

(*Alabama* question; perpetual leases.)

[881]

OBLIGATORY ARBITRATION

Annex 18

PROPOSITION OF THE SERBIAN DELEGATION

Draft of a new Article 19 for the Hague Convention of July 29, 1899, for the pacific settlement of international disputes [1]

ARTICLE 19

Independently of general or special treaties which at present provide or shall provide in future for obligatory arbitration as between the contracting States, the signatory Powers to the present Convention bind themselves to resort to arbitration and to submit their disputes to the Arbitration Court at The Hague:

a. For everything that concerns the interpretation or application of treaties of commerce, and conventions and agreements, under any form whatever, which are annexed thereto, as well as for all other treaties, conventions, agreements concerning the adjustment of economic, administrative and judicial interests.

b. For everything that concerns the execution of pecuniary agreements, the payment of indemnities or reparation for material damages between States or between a State and the subjects of other States, so far as the ordinary courts are not competent.

Annex 19

PROPOSITION OF THE PORTUGUESE DELEGATION

Amendments and additions to the Convention for the pacific settlement of international disputes of July 29, 1899 [2]

NEW ARTICLE (*replacing Article 16*)

The high contracting Parties agree to submit to arbitration differences of a legal nature or relating to the interpretation of treaties existing between the signatory Powers, which may arise among them and which cannot be
[882] settled by direct diplomatic negotiation, subject however to the condition that they do not involve either the essential interests or independence of the parties in dispute, or the interests of third Powers.

[1] See also annex 29.
[2] See also annex 34.

ARTICLE 16 *a*

It is understood that each of the contracting Powers has the exclusive right to determine whether any difference which may arise involves its vital interests or independence, and consequently is of such a nature as to be excepted from arbitration.

ARTICLE 16 *b*

The high contracting Parties agree not to avail themselves of the preceding article in the following cases:

1. Disputes concerning the interpretation or application of conventions already concluded or to be concluded and enumerated below:

(*a*) Treaties of commerce and navigation.
(*b*) Conventions regarding the international protection of workmen.
(*c*) Postal, telegraph (including wireless), and telephone conventions.
(*d*) Conventions concerning the protection of submarine cables.
(*e*) Conventions concerning railroads.
(*f*) Conventions and rules concerning means of preventing collisions at sea.
(*g*) Conventions concerning the protection of literary and artistic works.
(*h*) Conventions concerning industrial property (patents, trade-marks, and trade names).
(*i*) Conventions concerning regulation of commercial and industrial companies.
(*k*) Conventions concerning monetary and metric systems (weights and measures).
(*l*) Conventions concerning reciprocal free aid to the indigent sick.
(*m*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
(*n*) Conventions relating to matters of private international law.
(*o*) Conventions concerning civil or penal procedure.
(*p*) Extradition conventions.
(*q*) Diplomatic and consular privileges.

2. Settlement on land of the fixation of boundaries.

3. Disputes concerning pecuniary claims for damages when the principle of indemnity is recognized by the parties.

4. Questions relating to debts.

[883]

Annex 20

PROPOSITION OF THE AMERICAN DELEGATION

Plan for obligatory arbitration[1]

ARTICLE 1

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the

[1] See also annexes 21 and 37.

future, and which cannot be settled by diplomatic means, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said parties, and that they do not concern the interests of other States not parties to the dispute.

ARTICLE 2

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

ARTICLE 3

In each particular case the high contracting parties (the signatory Powers) shall conclude a special *compromis* (special protocol) conformably to the constitutions or laws of the high contracting parties (signatory Powers), defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

ARTICLE 4

The present convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all of the Powers which were represented at the International Peace Conference at The Hague.

ARTICLE 5

In the event of one of the high contracting parties denouncing the present convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

[884]

Annex 21

PROPOSITION OF THE DELEGATION OF THE UNITED STATES OF AMERICA

Plan for obligatory arbitration[1]

(New draft)

ARTICLE 1

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the

[1] See also annexes 20 and 37.

future, and which cannot be settled by diplomatic means, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

Article 2

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

Article 3

In each particular case the high contracting parties (the signatory Powers) shall conclude a special *compromis* (special protocol) conformably to the constitutions or laws of the high contracting parties (signatory Powers), defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

Article 4

The present convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all of the Powers which were represented at the International Peace Conference at The Hague.

Article 5

Each of the high contracting Parties shall have the right to denounce the Convention. This denunciation may involve either the total withdrawal of the denouncing Power from the Convention or the withdrawal with regard to a single Power [*article* ?] designated by the denouncing Power. In both cases, the Convention shall continue in effect in so far as it has not been denounced.

The denunciation, whether in whole or in part, shall not take effect until six months after notification thereof in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

[885]

Annex 22

PROPOSITION OF THE SWEDISH DELEGATION

Draft intended to replace Articles 14 to 19 of the Convention of July 29, 1899, for the pacific settlement of international disputes

Replace Articles 15 to 19 by the following:

Article 15

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the arbitral award.

Article 16

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

The signatory Powers agree to resort to arbitration in the case of disputes which may arise among them, and which could not be settled by diplomatic means, subject however to the condition that they do not involve the vital interests or independence of the parties in dispute.

Article 17

Each of the parties in dispute is judge of whether the difference which may arise involves its vital interests or independence, and, consequently, is of such a nature as to be comprised among those cases which, according to the preceding article, are excepted from obligatory arbitration.

Article 18

The signatory Powers agree not to avail themselves of the exceptions contained in Article 17 in the following cases, wherein arbitration shall in all instances be obligatory:

1. In case of pecuniary claims for damages when the principle of indemnity is recognized by the parties in dispute.

2. In case of pecuniary claims involving the interpretation or application of conventions of every kind between the parties in dispute.

3. In case of pecuniary claims arising from acts of war, civil war or so-called pacific blockade, the arrest of foreigners or the seizure of their property.

Article 19

The preceding articles do not detract from general or special treaties which at present provide a more extended recourse to arbitration by the signatory Powers.

These Powers reserve to themselves the right of concluding, either before the above articles become effective or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

[886]

Annex 23

PROPOSITION OF THE BRAZILIAN DELEGATION

Amendment to Article 16 of the Convention of July 29, 1899

1. In questions where they do not reach an agreement by diplomatic means or through good offices and mediation, if these questions do not affect the independence, territorial integrity, or essential interests of the parties, their institutions or internal laws, or the interests of third Powers, the signatory Powers bind themselves to resort to arbitration before the Permanent Court at The Hague, or if they prefer, through the nomination of arbitrators of their choice.

2. It is understood that the signatory Powers always reserve the right not to resort to arbitration until after good offices and mediation, if they are willing to resort to the latter methods of conciliation first.

3. In disputes relating to inhabited territories, recourse shall not be had to arbitration except with the prior consent of the peoples interested in the decision.

4. Each interested party shall decide finally whether the dispute involves its independence, territorial integrity, vital interests or institutions.

Annex 24

DECLARATION OF THE DELEGATION FROM THE DOMINICAN REPUBLIC

Whereas, at the Third International American Conference, held at the City of Rio de Janeiro, it was decided by the delegations attending, representing nineteen signatory Powers, among which was the Dominican Republic, to ratify their adhesion to the principle of arbitration, and, in the interest of promoting the growth and realization of so high an ideal, and of making it a matter of practice among all States, to recommend to the said signatory Powers that they instruct their representatives to the Second Hague Conference to endeavor to collaborate in the making of a general convention of arbitration which should become thereby a bond of brotherhood and concord, and the rule of conduct for all civilized nations;

Whereas, for the realization of so high and humanitarian an idea, which is

the ideal of international justice and the aspiration of all men of high intentions, it is necessary to give to arbitration the greatest scope, so that it may include all differences which might arise among States, the solution of which could with difficulty be reached by diplomatic means,—which implies necessarily that arbitration should be obligatory in all cases of differences or disputes between two or more States;

In the face of the actual facts and difficulties which lead to the belief that so great an ideal is not practical at this time, and anticipating the days when all nations, harmonizing their different interests to accord with the highest interests of humanity and real civilization of the world, shall agree upon the means of realizing such an aspiration, the delegation from the Dominican Republic expresses its desire for unrestricted international obligatory arbitration.

[887]

Annex 25

DECLARATION OF THE DANISH DELEGATION

Since the First Peace Conference the Danish Government, inspired by Article 19 of the Convention of July 29, 1899, for the pacific settlement of international disputes, has concluded obligatory arbitration conventions with the following Powers, to wit: the Netherlands, Russia, Belgium, France, Great Britain, Spain, Italy, and Portugal.

In the conventions of February 12, 1904, with the Netherlands, December 16, 1905, with Italy, and March 20, 1907, with Portugal, absolutely no reservation was made with regard to the matters of dispute which should be submitted to arbitration.

The text of the convention with the Netherlands provides in brief: "the high contracting parties bind themselves to submit to the Permanent Court of Arbitration all differences and all disputes between them which may not have been settled by diplomatic means," and the text of the conventions with Italy and Portugal says: "The high contracting parties bind themselves to submit to arbitration all differences of whatever character which may arise between them and which may not be settled by diplomatic means."

These last two conventions also contain the following provision regarding the special *compromis* to be signed in advance of the arbitration: "if there is no special *compromis*, the arbitrators shall pass judgment upon the basis of the claims formulated by the two parties."

The Government of Denmark, by the conclusions of these conventions, has sufficiently set forth its point of view and its desires in this matter, and the Danish delegation has the honor to call the attention of the subcommission to the texts above cited.

Annex 26

PROPOSITION OF THE DELEGATION OF MEXICO

Amendment to Article 1 of the proposition of the United States of America[1]

After the words:

"shall be submitted to the Permanent Court of Arbitration, established at The Hague by the Convention of July 29, 1899," add the following words: "unless the parties prefer to organize a special court by common agreement."

[888]

Annex 27

PROPOSITION OF THE SWISS DELEGATION

Modifications to be made to the Convention of July 29, 1899, for the pacific settlement of international disputes[2]

Article 16

Adopt the addition of paragraph 2 as proposed by the delegation from Austria-Hungary (*procès-verbal of the committee of examination A, session of August 6*).

Article 16 *a*

The signatory Powers declare that treaty provisions concerning matters enumerated below appear to be particularly suitable for submission to obligatory arbitration, arbitration treaties and arbitration clauses in treaties already concluded, or to be concluded, being reserved:

1. Commerce and navigation.
2. International protection of workmen.
3. Posts, telegraphs, and telephones.
4. Protection of submarine cables.
5. Railroads.
6. Means of preventing collisions at sea.
7. Protection of literary and artistic works.
8. Industrial property.
9. Regulation of industrial and commercial companies.
10. Money, weights, and measures.
11. Reciprocal free aid to the indigent sick.
12. Epidemics, epizooty, etc.
13. Private international law.
14. Civil and criminal procedure.
15. Extradition.
16. Diplomatic and consular privileges.

etc., etc.

[1] Annex 21.
[2] See also annex 28.

ARTICLE 16 *b*

The signatory Powers which would be willing, under reciprocal conditions, to accept obligatory arbitration for all or a part of the above-named matters, shall send notice of these matters through the International Bureau established at The Hague to the other signatory Powers of the present Convention.

[889] Obligatory arbitration shall be established for one signatory Power with regard to another as soon and so far as these Powers shall have given notice of their adoption of the same matters appearing in the list in Article 16 *a*.

ARTICLE 19

Independently of the general or special treaties which now provide obligatory recourse to arbitration for the signatory Powers, *and independently of the obligation of Articles 16 a and 16 b,* the said Powers reserve the right to conclude either before the ratification of this act or later, new agreements, general or private, with a view to extending obligatory arbitration to all *other* cases which they deem it possible to submit to it.

Annex 28

PROPOSITION OF THE SWISS DELEGATION

Modifications to be made to the Convention of July 29, 1899, for the pacific settlement of international disputes[1]

(Revision)

ARTICLE 16

Adopt the addition of paragraph 2 as proposed by the delegation from Austria-Hungary (*procès-verbal of the committee of examination A, session of August 6*).

ARTICLE 16 *a*

Independently of the general or special treaties which now provide or shall provide in the future for obligatory arbitration between the contracting States, the signatory Powers to the present Convention which, under reciprocal conditions, would be willing to accept obligatory arbitration for all or any one of the matters enumerated below, shall make known their decision through the Netherland Government to the other signatory Powers to the present Convention:

1. Commerce and navigation.
2. International protection of workmen.
3. Posts, telegraphs, and telephones.
4. Protection of submarine cables.
5. Railroads.
6. Means of preventing collisions at sea.
7. Protection of literary and artistic works.

[1] See also annex 27.

8. Industrial property.
9. Regulation of industrial and commercial companies.
10. Money, weights, and measures.
[890] 11. Reciprocal free aid to the indigent sick.
12. Epidemics, epizooty, etc.
13. Private international law.
14. Civil and criminal procedure.
15. Extradition.
16. Diplomatic and consular privileges.
etc., etc.

Obligatory arbitration shall be established for one signatory Power with regard to another as soon and so far as these Powers shall have given notice of their adoption of the same matters appearing in the above list.

ARTICLE 16 *b*

Arbitration treaties and arbitration clauses in treaties already concluded or to be concluded shall be reserved.

Annex 29

PROPOSITION OF THE DELEGATION OF SERBIA

Plan for an obligatory arbitration treaty[1]

ARTICLE 1

Independently of general or special treaties which at present provide or shall provide in future for obligatory arbitration as between the contracting States, the signatory Powers to the present Convention bind themselves to submit to arbitration the following disputes, in case they cannot be settled by diplomatic means:

1. Disputes concerning the interpretation and application of the following Conventions:

(*a*) Postal, telegraph (including wireless), and telephone conventions;
(*b*) Conventions concerning the protection of literary and artistic works;
(*c*) Conventions concerning industrial property (patents, trade-marks, and trade names);
(*d*) Conventions regarding the international protection of workmen;
(*e*) Conventions concerning the protection of submarine cables;
(*f*) Conventions and rules concerning means of preventing collisions at sea;
(*g*) Conventions concerning monetary systems, weights and measures;
(*h*) Conventions concerning reciprocal free aid to the indigent sick;

[1] See also annex 18.

(*i*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences;

[891] (*k*) Conventions relating to matters of private international law;

(*l*) Conventions concerning regulation of commercial, industrial, and insurance companies;

(*m*) Stipulations of treaties of commerce and of navigation relating to conventional tariffs and laws which, under any denomination (accessory laws, taxes on monopolies, sumptuary taxes for the benefit of the State or of districts, etc.) affect merchandise on entry, on departure, and in transit, also those relating to nationality and to the treatment of ships and their cargoes;

2. Disputes concerning the fixing of boundaries, in so far as they do not concern the inhabited parts of the territory or those of particular importance from an economical or strategical point of view.

3. Disputes concerning the execution of pecuniary agreements, arising from contracts between States or between a State and the *ressortissants* of other States, so far as the ordinary courts are not competent.

4. Disputes relating to the obligations and the execution of obligations of States relative to public debts, in so far as concerns the foreign holders of the certificates of these debts.

5. Disputes relative to the settlement of the amount and the payment of indemnities or reparation for material damages, when the principle is recognized by the interested parties.

Article 2

In each particular case submitted to arbitration after this Convention, a special *compromis* shall be drawn up by the parties in dispute, conformably to their respective constitutions and laws, defining clearly the subject of the dispute, the constitution of the arbitral tribunal, the extent of its powers, and the procedure to be followed.

Article 3

When there is a question of the interpretation or application of a general convention, the procedure shall be as follows, so far as it is not determined by the aforesaid conventions themselves, or by special agreements which may be attached thereto:

The litigant parties shall notify all the contracting Powers of the *compromis* which they have signed, and the contracting Powers have a period of . . . , counting from the day of the notification, to declare whether and in what way they will take part in the litigation.

The arbitral award is binding upon all the States taking part in the litigation, both in their mutual relations and in their relations to other contracting Powers.

The States which have not taken part in the litigation may demand a new arbitration upon the same question, whether it concerns disputes which have arisen between them, or whether they do not agree to accept the award rendered with regard to States taking part in the first litigation.

If the second arbitral award is the same as the first, the question is finally settled and this decision, thus having become an integral part of the Convention, shall be binding upon all of the contracting parties. If, on the contrary, the

second decision differs from the first, a third arbitration may be demanded by any contracting State and the third award shall then be generally binding.

[892] ARTICLE 4

The present Convention has no retroactive power and applies, in so far as it concerns the interpretation and the application of treaties, only to those treaties concluded or renewed after its going into effect, and, in so far as it concerns the disputes provided for under Nos. 2, 3, 4 and 5 of Article 1, only to those cases arising since its going into effect.

Annex 30

PROPOSITION OF THE FIRST SUBCOMMITTEE OF COMMITTEE OF EXAMINATION A OF THE FIRST SUBCOMMISSION

Amendments to Article 16 b *of the Portuguese Proposition* [1]

I

The high contracting Parties agree not to avail themselves of the preceding article in the following cases:

Disputes concerning the interpretation or application of conventions concluded or to be concluded and enumerated below, *so far as they refer to agreements which should be directly executed by the Governments or by their administrative departments.*

(*a*).....
(*b*).....
.....
.....

II

If all the signatory States of one of the Conventions enumerated herein are parties to a litigation concerning the interpretation of the Convention, the arbitral award shall have the same force as the Convention itself and shall be equally well observed.

If, on the contrary, the dispute arises between some only of the signatory States, the parties in litigation shall notify the signatory Powers within a reasonable time, and they have the right to intervene in the suit.

The arbitral award, as soon as it is pronounced, shall be communicated by the litigant parties to the signatory States which have not taken part in the suit. If the latter unanimously declare that they will accept the interpretation of the point in dispute, adopted by the arbitral award, this interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the judgment shall be valid only as regards the matter which formed the subject of the case between the litigant parties.

It is well understood that the present Convention does not in any way affect the arbitration clauses already contained in existing treaties.

[1] Annex 19.

[893]

Annex 31

PROPOSITION OF THE BRITISH DELEGATION

New articles to be added to the Convention of July 29, 1899 [1]

Article 16 *a*

The high contracting parties agree not to avail themselves of the preceding article in the following cases:

1. Disputes concerning the interpretation of treaty provisions relating to:
   (*a*) Customs tariffs.
   (*b*) Measurement of vessels.
   (*c*) Equality of foreigners and nationals as to taxes and imposts.
   (*d*) Right of foreigners to acquire and hold property.

2. Disputes concerning the interpretation or application of the conventions listed below:
   (*a*) Conventions regarding the international protection of workmen.
   (*b*) Conventions concerning railroads.
   (*c*) Conventions and rules concerning means of preventing collisions at sea.
   (*d*) Conventions concerning the protection of literary and artistic works.
   (*e*) Conventions concerning the regulation of commercial and industrial companies.
   (*f*) Conventions concerning monetary and metric systems (weights and measures).
   (*g*) Conventions concerning reciprocal free aid to the indigent sick.
   (*h*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
   (*i*) Conventions relating to matters of private international law.
   (*j*) Conventions concerning civil or criminal procedure.

3. Disputes concerning pecuniary claims for damages, when the principle of indemnity is recognized by the parties.

Article 16 *b*

It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force.

Article 16 *c*

The provisions of Article 16 *a* cannot in any case be relied upon when it is a question of the interpretation or application of extraterritorial rights.

[1] See also annexes 32 and 39.

[894]

Annex 32

PROPOSITION OF THE BRITISH DELEGATION

New articles to be added to the Convention of July 29, 1899

(Revision) [1]

Article 16 *a*

The high contracting parties agree to submit to arbitration without reserve disputes concerning:

A. Interpretation and application of treaty provisions concerning the following matters:

1. Customs tariffs.
2. Measurement of vessels.
3. Wages and estates of deceased seamen.
4. Equality of foreigners and nationals as to taxes and imposts.
5. Right of foreigners to acquire and hold property.
6. International protection of workmen.
7. Means of preventing collisions at sea.
8. Protection of literary and artistic works.
9. Regulation of commercial and industrial companies.
10. Monetary systems; weights and measures.
11. Reciprocal free aid to the indigent sick.
12. Sanitary regulations.
13. Regulations concerning epizooty, phylloxera and other similar pestilences.
14. Private international law.
15. Civil or commercial procedure.

B. Pecuniary claims for damages when the principle of indemnity is recognized by the parties.

Article 16 *b*

It is understood that the stipulations providing for obligatory arbitration under special conditions which appear in treaties already concluded or to be concluded, shall remain in force.

Article 16 *c*

Article 16 *a* does not apply to disputes concerning provisions of treaties regarding the enjoyment and exercise of extraterritorial rights.

[1] See also annexes 31 and 39.

[895]

Annex 33

PROPOSITION OF THE SECOND SUBCOMMITTEE OF COMMITTEE OF EXAMINATION A OF THE FIRST SUBCOMMISSION

Communication of his Excellency Mr. Hammarskjöld.

Obligatory arbitration, rejected for "treaties of commerce and navigation," the scope of which is too broad and too complex, might be proposed *for the interpretation:*

of treaty provisions concerning customs tariffs;

of clauses granting foreigners the right to pursue commercial navigation personally under certain restrictions;

of clauses regarding taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck;

of clauses concerning the measurement of vessels;

of clauses providing for equality of foreigners and nationals as to taxes and imposts;

of clauses relative to the right of foreigners to pursue commerce or industry, to practice the liberal professions, whether it is a case of a direct grant, or of being placed upon an equality with nationals;

of clauses providing the right of foreigners to acquire and hold property.

Annex 34

PROPOSITION OF THE PORTUGUESE DELEGATION

Amendments and additions to the Convention for the pacific settlement of international disputes [1]

(Revision)

NEW ARTICLE (*replacing* ARTICLE 16)

The high contracting Powers agree to submit to arbitration differences of a legal nature, and especially those relating to the interpretation of treaties existing between the signatory Powers, which may arise among them and which cannot be settled by direct diplomatic negotiation, subject however to the condition that they do not involve either the vital interests or independence of the parties in dispute.

[896] ARTICLE 16 *a*

It is understood that each of the contracting Powers has the exclusive right to determine whether any difference which may arise involves its vital interests

[1] See also annex 19.

or independence and consequently is of such a nature as to be excepted from arbitration.

ARTICLE 16 *b*

The high contracting parties agree to submit to arbitration without reserve disputes concerning:

A. Interpretation and application of *treaty provisions* concerning the following subjects:

1. Customs tariffs.
2. Taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck.
3. Measurement of vessels.
4. Equality of foreigners and nationals as to taxation and imposts.
5. The right of foreigners to pursue commerce and business, to practice the liberal professions, whether it is a case of a direct grant, or of being placed upon an equality with nationals.
6. Right of foreigners to acquire and hold property.
7. International protection of workmen.
8. Means of preventing collisions at sea.
9. Protection of literary and artistic works.
10. Patents, trade-marks and trade names.
11. Regulation of commercial and industrial companies.
12. Monetary systems; weights and measures; geodetic questions.
13. Reciprocal free aid to the indigent sick; conventions providing for repatriation.
14. Emigration.
15. Sanitary regulations.
16. Regulations concerning epizooty, phylloxera, and other similar pestilences.
17. Private international law.
18. Civil or criminal procedure.

B. Application to the land of the boundaries fixed by a treaty when it does not concern inhabited territories.

C. Pecuniary claims for damages when the principle of indemnity is recognized by the parties.

D. Contract debts.

[897]

Annex 35

NOTE OF HIS EXCELLENCY MR. ASSER, CONCERNING INTERNATIONAL OBLIGATORY ARBITRATION

It seems to me to follow from the discussions in the committee of examination that a divergence of opinion exists with regard to the very nature of the international arbitration which it is proposed to make obligatory in certain cases.

According to some, international arbitration is destined in cases between States to be what ordinary tribunals are in cases between individuals. According to this conception, international arbitration has for its purpose the application of law to a special case which has given rise to a dispute between two or more States. The arbitral award may have for its object the sentencing of the defendant to perform or permit a certain act, to pay a sum of money, etc., or perhaps the determination of frontiers between States or any other special regulation with regard to which a disagreement has arisen.

If it is a question of the interpretation of a convention, this interpretation is given with reference to a special case; if the same difference arises later in another case the new arbitrators are at liberty to decide it according to their judicial ideas. The precedent does not bind them, unless there is ground for pleading *res judicata.*

In other words, the arbitral tribunal cannot render an award which is legally binding in the future, any more than can national tribunals (*arrêt de règlement*).

According to this idea of arbitration, it could not be applied except in cases where States themselves are litigant parties, and where it is a question of obtaining a judgment with regard to their reciprocal obligations or to their rights as States, flowing either from treaties or from some other source of international law.

It is important, therefore, to distinguish between treaty provisions in which one State makes direct promises to another State or its *ressortissants,* and those in which it agrees only to give legal force to certain provisions contained in the Convention. With regard to the latter, the State (or its Government) has fulfilled the duty which falls upon it by virtue of the treaty, as soon as the provision in question has been given the force of law in the manner prescribed in the State's constitution (either by ratification of the treaty itself, after parliamentary [in the United States, congressional] approval, where it is required, or by the insertion of the treaty provisions in a national law).

The interpretation of these provisions, thus become an integral part of the national legislation, is within the jurisdiction of the national tribunals.

Let me take as an example a case governed by a treaty of private international law.

With regard to an action of divorce the tribunal, *acting in accord with the Convention itself,* interpreted a clause of the Convention in a certain way.

In another divorce case the tribunal of another contracting State gave a different interpretation to the same clause.

It is clear that in a situation such as I have just set forth there is no place for international arbitration. An arbitral decision could not destroy the force of the decision of a national judge in an individual case; and, as has been said, arbitration could not, in the same situation, be invoked to give to the provision in question an official interpretation to have the force of law in the future.

[898] According to the other idea developed in the committee, international arbitration has for its definite purpose legislation for the future, in the sense that judgments are considered as the complement of the treaties themselves. Nothing then is against resort to arbitration with regard to a dispute in which a judgment has been entered, even in a court of last resort, under the national judicial system. While respecting this decision in the special case in question, the arbitrators in some measure take the place of the contracting parties themselves, completing the Convention by their judgment, which, in truth, has the force of an additional protocol.

I do not in any way fail to recognize the usefulness of such an application of international arbitration; I believe especially that in the case of the *unions* which have not yet introduced obligatory arbitration, it would be marked progress.

But it seems to me clear that where it is a question of introducing *universal* obligatory arbitration into international law for the first time, without the reservation as to vital interests or national honor, we should be content with an arbitration of the more restricted scope, first above set forth.

This will not prevent States from concluding special conventions for the organization of a more effective and radical form of international arbitration. When the question of avoiding difficulties which may result from the differing interpretations of the same Convention by the courts of the different contracting States arises, then especially can the new Permanent Court of Arbitration render great service as a court of appeal or a court of regulation.

There already exists an international court intended to ensure the uniform interpretation of a convention; that is the Central Commission for the Navigation of the Rhine, established by the Acts of Navigation of 1831 and 1868. It passes as a court of last resort upon differences arising out of the general regulations concerning the navigation of the Rhine.[1]

To return to the question of the nature of obligatory arbitration to be introduced by the Convention, I believe that the explanation proposed by the subcommittee to be inserted in the *procès-verbal* would remove any doubt in this connection, especially if a slight change were made in the last part of the phrase.

Instead of saying:

"With the intention of excluding from the operation of obligatory arbitration the treaties in question, so far as they refer to provisions of which the interpretation and application in case of dispute are within the jurisdiction of national courts."

(which might still cause misunderstanding), it would perhaps be preferable to say:

"With the intention of excluding from the operation of obligatory arbitration treaty provisions intended to form part of national legislation of which the interpretation and application consequently, in case of dispute, are within the jurisdiction of national courts."

It has been proposed to indicate here that this restriction does not concern disputes between individuals, but such an amendment does not seem to me worthy of recommendation, since the treaty provisions in question may also be of a *penal* character. In this case it is not a question of a dispute between *individuals.*

I beg to observe in closing that in this note I have presented only my personal opinion.

[1] Except for the strange provision, which diminishes the value of the institution, providing that the party which loses in the first instance has the right to choose as a court of appeal either the competent national court or the international commission.

[899]

Annex 36

AMENDMENT PRESENTED BY THE DELEGATION OF GREECE

Every restriction or reservation which any one of the signatory Powers may add with respect to matters regarding which it declares itself willing to accept arbitration, may be invoked against that Power by any other Power, even if the latter has not made any reservation or restriction with respect to the said matters in its notification.

Annex 37

PROPOSITION OF THE AMERICAN DELEGATION

Plan for obligatory arbitration[1]

(New draft of August 26, 1907)

Article 1

Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

Article 2

Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article.

Article 3

Each of the signatory Powers agrees not to avail itself of the provisions of the preceding article in such of the following cases as shall be enumerated in its ratification of this Convention, and which shall also be enumerated in the ratifications of every other Power with which differences may arise; and each of the signatory Powers may extend this agreement to any or all cases named in its ratification to all other signatory Powers or may limit it to those which it may specify in its ratification.

[900] 1. Disputes concerning the interpretation of treaty provisions relating to:
(*a*) Customs tariffs.
(*b*) Measurement of vessels.

[1] See also annexes 20 and 21.

(*c*) Equality of foreigners and nationals as to taxes and imposts.
(*d*) Right of foreigners to acquire and hold property.

2. Disputes concerning the interpretation or application of the conventions enumerated below:

(*a*) Conventions concerning the international protection of workmen.
(*b*) Conventions concerning railroads.
(*c*) Conventions and rules concerning means of preventing collisions of vessels at sea.
(*d*) Conventions concerning the protection of literary and artistic works.
(*e*) Conventions concerning the regulation of commercial and industrial companies.
(*f*) Conventions concerning monetary and metric systems (weights and measures).
(*g*) Conventions concerning reciprocal free aid to the indigent sick.
(*h*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
(*i*) Conventions relating to matters of private international law.
(*j*) Conventions concerning civil or criminal procedure.

3. Disputes concerning pecuniary claims for damages, when the principle of indemnity is recognized by the parties.

Article 4

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal.

Article 5

It is understood that stipulations providing for obligatory arbitration under special conditions, which appear in treaties already concluded or to be concluded, shall remain in force.

Article 6

The provisions of Article 3 can in no case be relied upon when the question concerns the interpretation or application of extraterritorial rights.

Article 7

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

The ratification of each signatory Power shall specify the cases enumerated
[901] in Article 3 wherein the ratifying Power will not avail itself of the provisions of Article 2; and it shall specify also with which one of the other Powers the agreement provided by Article 3 is made with regard to each of the cases specified.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all of

the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications including additional cases enumerated in Article 3.

ARTICLE 8

Each of the signatory Powers shall have the right to denounce the Convention. This denunciation may involve either the total withdrawal of the denouncing Power from the Convention or the withdrawal with regard to a single Power designated by the denouncing Power.

This denunciation may also be made with regard to one or several of the cases enumerated in Article 3.

The Convention shall continue to exist to the extent to which it has not been denounced.

The denunciation, whether in whole or in part, shall not take effect until six months after notification thereof in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

Annex 38

PROPOSITION OF THE DELEGATION OF AUSTRIA-HUNGARY

Resolution relating to obligatory arbitration [1]

To-day we have gathered for the sixth meeting of the committee of examination to discuss the question of obligatory arbitration, a question which stirs us above all others, and which, among all, seems to me to be in truth the only question which—provided that we find a solution thereof, however unsatisfactory—can impress the assembly of which we are a part with the real character of a peace conference. Then, too, in devoting long hours to the study of this problem, as we have done, we have certainly not frittered away our time, and our efforts have not been entirely useless labor.

The energy which we have devoted to this subject, the care which we have taken to examine it from all sides, the high plane upon which we have exchanged our views in this connection, all permit us to report very exactly upon the nature and scope of the problem with which we are concerned.

Our eminent president has praised these discussions by saying that there
[902] was real intellectual pleasure in listening to them, and I, for my part, am imbued with the same idea. Our president has very properly stated also that this discussion has in some respects and some measure already produced positive results. For I believe I may apply this term to the statement of a well-considered intention on the part of most of our colleagues to accept the principle of obligatory arbitration. I shall also consider as a positive result the conviction which we have reached in this same discussion that only certain categories of international treaties, or certain parts of these treaties, are, in case of divergence of opinion, capable of being submitted to obligatory arbitration. Finally, we can

[1] See also annexes 42 and 45.

consider as the fruit of our labors the very fact that we have been able to see the difficulties both of a legal and especially of a technical character, which are opposed to the adoption by the Conference itself of the matters which may, without further restriction, become the subject of a provision for obligatory arbitration.

It is with regard to this latter point that I desire to make a further explanation.

With this in mind I stop first, for a moment, upon a question of prime importance which may seem to be simply a question of form, of phraseology, but which, looked at a little more closely, is indeed of the essence of things, and seems to me on more than one point to lead to a conclusion.

In examining questions to see whether they are capable or not of being the subject of an arbitration convention we are unanimous in dividing them into two main groups: differences of a political nature which necessarily are omitted from a general arbitration clause, and disputes of a legal character, the nature of which on the contrary is not opposed in any way to a recourse to arbitration.

Now, among the latter we are accustomed to distinguish to some extent between disputes outside the treaty provisions (legal questions) and those which concern the interpretation or application of international treaties. This customary distinction, which I admit, and which has become a part of the draft presented by the Portuguese delegation, seems to me, however, hardly exact, or at least incomplete, and by simply running through the list of treaties and conventions which according to the Portuguese proposition should be submitted without reserve to obligatory arbitration, we may easily perceive that disputes might arise concerning these international agreements, bearing in the greater number of cases not a legal character, but an almost exclusively technical character.

It seems to me that three conclusions follow from this statement:

1. The necessity for more exact phraseology.

2. The incompetence, not from a legal point of view, but, if I may venture to express it thus, from a technical point of view, of the Permanent Court of Arbitration, both of the institution already bearing this name, and of that other which it is intended to create, to pass upon disputes of an essentially technical character and requiring consequently special knowledge and abilities.

3. The incompetence for the same reason of the Conference itself to determine which of the conventions listed in the Portuguese plan would, in case of dispute, lend themselves either in whole or in part to obligatory arbitration, without mentioning the fact that the Conference would have had barely time enough to make a conscientious study of so delicate a matter.

Do not think, gentlemen, that in the course of my argument I am leading to the statement: Well, since the Conference lacks the necessary power and ability to decide this problem, let us give it up!

[903] This conclusion would perhaps be logical, but there is another which, without being less logical, I believe coincides much better with the sentiments of all of us.

In my view the most desirable course under the circumstances which I have stated would be for the Conference to adopt a resolution based upon the following ideas:

After having considered this subject with all the attention which it deserves, the Conference can state that there exists within the limits which are still to be clearly and distinctly fixed, certain matters which, in case of dispute, may be

submitted to obligatory arbitration without reserve. This method of settlement appears to recommend itself particularly for disputes arising from a difference of opinion as to the interpretation or application of certain international conventions —or parts of conventions—which might be taken from the list appearing in the proposition of the Portuguese delegation.

Now, the matters in question having for the greater part a more or less technical character, we could scarcely avoid a preliminary examination before determining which cases, upon occasion, might be included within the domain of obligatory arbitration in the future. It is evident that the Conference is not competent to go ahead in this matter with a full knowledge of all the details which it must consider; such a task should on the contrary be undertaken by experts versed in the matters in question.

Under these circumstances the Conference hands over to the Governments themselves the duty of taking in hand this preparatory work with a view to reaching an international agreement sanctioning, within the limits which they consider wise, the principle recognized by the Conference.

To make evident, moreover, how important the Conference considers it that the resolution should not become a dead letter, but that it should, on the contrary, be put into practice as soon as possible, it would perhaps be well to determine in the resolution itself a certain period for the respective Governments to study the matter in question, after which the Powers should communicate with each other through the Royal Netherland Government with a view to reaching a solution of the problem.

I have tried to formulate the resolution which I propose to you, and I beg to submit the following text for your consideration, making every reservation as to matters of phraseology:

RESOLUTION

After having conscientiously weighed the question of arbitration, the Conference has finally come to the conclusion that certain matters, carefully specified, are susceptible of submission to obligatory arbitration without any restriction, and that those which lend themselves particularly to this method of settlement are disputes regarding the interpretation or application of certain international conventions—or parts of conventions—appearing among those which are contained in the proposition of the Portuguese delegation.

Most of the matters in question being more or less technical in character, any decision as to the extent to which and the conditions under which obligatory recourse to arbitration might here be introduced should, however, [904] be preceded by such study as is beyond the competence of the Conference and can be entrusted only to experts, inasmuch as it requires special knowledge and experience. The Conference, therefore, invites the Governments after the close of the Hague meeting to submit the question of obligatory arbitration to a serious examination and profound study. This study must be completed by the ——, at which time the Powers represented at the Second Hague Conference shall notify each other through the Royal Netherland Government of the matters which they are willing to include in a stipulation regarding obligatory arbitration.

I need not add that the plan as it appears to me could not be accepted unless supported by the votes of all, or nearly all, of the delegates.

The resolution which I beg to propose to you would guarantee to a certain

extent the application of obligatory arbitration to the matters under discussion; it would at the same time take into account the very proper scruples which the discussion of this subject has aroused in the minds of many of our colleagues, and by ordering a preliminary study of the technical side of the question, it would ensure in the end an agreement of a thoughtful and practical character.

Annex 39

PROPOSITION OF THE BRITISH DELEGATION

New articles to be added to the Convention of July 29, 1899 [1]

(Third revision of the proposition)

ARTICLE 16

Differences of a legal nature, and especially questions relating to the interpretation of treaties existing between two or more of the contracting States, which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to arbitration, subject, however, to the condition that they do not involve either the vital interests or independence or honor of any of the said States, and that they do not concern the interests of other States not parties to the dispute.

[905]

ARTICLE 16 *a*

Each of the signatory Powers shall have the right to determine whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which according to the preceding article are excepted from obligatory arbitration.

ARTICLE 16 *b*

The high contracting Powers recognize that in certain disputes provided for in Article 16 there are reasons for renouncing the right to avail themselves of the reservations therein set forth.

ARTICLE 16 *c*

With this in mind they agree to submit to arbitration without reservation disputes concerning the interpretation and application of treaty provisions relating to the following subjects:

1.
2.
3.
4.
etc., etc.

ARTICLE 16 *d*

The high contracting Parties also decide to annex to the present Convention a protocol enumerating:

[1] See also annexes 31, 32 and 40.

1. Other subjects which seem to them at present capable of submission to arbitration without reserve.

2. The Powers which, from now on, contract with one another to make this reciprocal agreement with regard to part or all of these subjects.

ARTICLE 16 *e*

It is understood that arbitral awards shall never have more than an interpretative force, with no retroactive effect upon prior judicial decisions.

ARTICLE 16 *f*

It is understood that stipulations providing for obligatory arbitration under special circumstances which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 16 *g*

Article 16 a *does not apply to disputes concerning treaties regarding the enjoyment and exercise of extraterritorial rights.*

[906]

Annex 40

PROPOSITION OF THE BRITISH DELEGATION

Protocol mentioned in Article 16 d *of the British proposition*[1]

1

Each Power signatory to the present protocol accepts arbitration without reserve in such of the cases listed in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it makes this engagement with each of the other signatory Powers whose reciprocity in this respect is indicated in the same manner in the table.

2

Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table with respect to which it may not already have accepted arbitration without reserve. For this purpose it shall address itself to the Netherland Government, which shall have this acceptance indicated on the table and shall immediately forward true copies of the table as thus completed to all the signatory Powers.

3

Moreover, two or more signatory Powers, acting in concert, may address themselves to the Netherland Government and request it to insert in the table additional subjects with respect to which they are ready to accept arbitration without reserve. These additional matters shall be entered upon the table, and a certified copy of the text as thus corrected shall be communicated at once to all the signatory Powers.

[1] Annex 39; see also annex 41.

4

Non-signatory Powers are permitted to adhere to the present protocol by notifying the Netherland Government of the matters in the table with respect to which they are ready to accept arbitration without reserve.

[907]

Annex 41

PROPOSITION OF THE DELEGATION OF GREAT BRITAIN

Protocol mentioned in Article 16 d *of the British proposition*[1]

(New draft)

Article 1

Each Power signatory to the present Convention accepts arbitration without reserve in controversies concerning the interpretation and application of conventional stipulations relating to such of the matters enumerated in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it contracts this engagement with each of the other signatory Powers, whose reciprocity in this respect is indicated in the same manner in the table.

Article 2

Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table, with respect to which it may not already have accepted arbitration without reserve in the terms of the preceding article. For this purpose it shall address itself to the Netherland Government, which shall notify this acceptance to the International Bureau at The Hague. After having made proper notation in the table referred to in the preceding article, the International Bureau shall immediately forward true copies of the notification and of the table thus completed to the Governments of all the signatory Powers.

Article 3

Moreover, two or more of the signatory Powers, acting in concert, may address themselves to the Netherland Government and request it to insert in the table additional matters, with respect to which they are ready to accept arbitration without reserve in the terms of Article 1.

These additional matters shall be inserted in the table, and the notification as well as the corrected text of the table shall be transmitted to the signatory Powers in the manner prescribed by the preceding article.

Article 4

Non-signatory Powers are permitted to adhere to the present Protocol by notifying the Netherland Government of the matters in the table with respect to which they are ready to accept arbitration without reserve in the terms of Article 1.

[1] Annex 39; see also annex 40.

[908–909]	*Germany*	*United States of America*	*Argentine Republic*	*Austria-Hungary*	*Belgium*	*Bolivia*	*Brazil*	*France*	*Great Britain*	*Portugal*	*Etc.*
A. Interpretation and application of treaty provisions relating to the following matters:											
1. Customs tariffs											
2. Measurement of vessels..											
3. Wages and estates of deceased seamen											
4. Equality of foreigners and nationals as to taxes and imposts											
5. Right of foreigners to acquire and hold property											
6. International protection of workmen											
7. Means of preventing collisions at sea											
8. Protection of literary and artistic works											
9. Industrial property											
10. Regulation of commercial and industrial companies											
11. Regulation of insurance companies											
12. Monetary systems											
13. Weights and measures....											
14. Reciprocal free aid to the indigent sick											
15. Sanitary regulations											
16. Regulations concerning epizooty, phylloxera, and other similar pestilences											
17. Private international law											
18. Civil or commercial procedure											
19. Taxes against vessels (dock charges, lighthouse and pilot dues) salvage charges and taxes imposed in case of damage or shipwreck											
20. Right of foreigners to pursue commerce and industry, to practice the liberal professions, whether it is a case of a direct grant, or of being placed upon an equality with nationals											

[910-911]	*Germany*	*United States of America*	*Argentine Republic*	*Austria-Hungary*	*Belgium*	*Bolivia*	*Brazil*	*France*	*Great Britain*	*Portugal*	*Etc.*
21. Patents, trade-marks, and trade names											
22. Reciprocal free aid to the indigent sick											
23. Repatriation											
24. Emigration											
25. Geodetic questions											
26. Posts, telegraphs (including wireless) telephones											
27. Submarine cables											
28. Railroads											
29. Extradition											
30. Diplomatic and consular privileges											
31. Conventional tariffs, and laws which under any denomination (accessory laws, taxes on monopolies, sumptuary taxes for the benefit of the State or of districts, etc.) affect merchandise on entry, on departure and in transit, also those relating to nationality and to the treatment of ships and their cargoes											
B. Pecuniary claims											
1. for damages when the principle of indemnity is recognized by the parties											
2. involving the interpretation or application of conventions of every kind between the parties in dispute											
3. arising from acts of war, civil war, or the arrest of foreigners or seizure of their property											
C. Disputes concerning the fixing of boundaries, in so far as they do not concern the inhabited parts of the territory or those of particular importance from an economical or strategical point of view											

[912]

Annex 42

PROPOSITION OF THE DELEGATION OF AUSTRIA-HUNGARY

Resolution relative to obligatory arbitration[1]

(New draft)

After having conscientiously weighed the question of arbitration, the Conference has finally come to the conclusion that certain matters, carefully specified, are susceptible of submission to obligatory arbitration without any restriction, and that those which lend themselves particularly to this method of settlement are disputes regarding the interpretation or application of certain international conventions—or parts of conventions—appearing among those which are contained in the proposition of the Portuguese delegation.

Most of the matters in question being more or less technical in character, any decision as to the extent to which and the conditions under which obligatory recourse to arbitration might here be introduced should, however, be preceded by such study as is beyond the competence of the Conference and can be entrusted only to experts, inasmuch as it requires special knowledge and experience. The Conference, therefore, invites the Governments after the close of the Hague meeting to submit the question of the application of obligatory arbitration to certain international conventions—or parts of conventions—to a serious examination and profound study. This study must be completed by the . . . , at which time the Powers represented at the Second Hague Conference shall notify each other through the Royal Netherland Government of the matters which they are willing to include in a stipulation regarding obligatory arbitration.

Annex 43

PROPOSITION OF THE DELEGATION OF ITALY

Amendment to Article 16 of the Convention of July 29, 1899

The signatory Powers state that the principle of obligatory arbitration is applicable to disputes which have not been settled through diplomatic channels and which concern questions of a legal nature, more especially questions as to the interpretation or application of international conventions.

Consequently they engage to study most carefully and as soon as possible the question of the application of obligatory arbitration. Such study must be completed by December 31, 1908, at which time, or even earlier, the Powers represented at the Second Hague Conference will notify each other reciprocally, through the Royal Netherland Government, of the matters which they are ready to include in a stipulation concerning obligatory arbitration.

[1] See also annexes 38 and 45.

[913]

Annex 44

PROPOSITION OF THE DELEGATION OF SERBIA

Amendment to the British proposition [1]

Read Article 16 *e* as follows:

It is understood that arbitral awards, in so far as they relate to questions coming within the jurisdiction of national courts, shall have merely an interpretative force, with no retroactive effect upon prior judicial decisions.

Annex 45

PROPOSITION OF THE DELEGATION OF AUSTRIA-HUNGARY [2]

Resolution relative to obligatory arbitration

(New draft of September 8, 1907)

After having conscientiously weighed the question of arbitration, the Conference has come to the conclusion that certain matters, carefully specified, are susceptible of submission to obligatory arbitration without any restriction, and that those which lend themselves particularly to this method of settlement are disputes regarding the interpretation or application of certain international conventions or parts of conventions.

Most of the matters in question being more or less technical in character, any decision as to the extent to which and the conditions under which obligatory recourse to arbitration might here be introduced should, however, be preceded by such study as is beyond the competence of the Conference and can be entrusted only to experts, inasmuch as it requires special knowledge and experience. The Conference therefore invites the Governments, after the close of the Hague meeting, to submit the question of the application of obligatory arbitration to certain international conventions—or parts of conventions—to careful examination and profound study. This study must be completed by . . . , at which time the Powers represented at the Second Hague Conference shall notify each other, through the Royal Netherland Government, of the matters which they are willing to include in a stipulation regarding obligatory arbitration.

[1] Annex 39
[2] See also annexes 38 and 42.

[914]

Annex 46

PROPOSITION OF THE DELEGATION OF RUSSIA

A.—*Convention for the pacific settlement of international disputes*

ARTICLE 16

Old text. In questions of a legal nature, and especially in the interpretation or application of international conventions, etc.

ARTICLE 17

New text. On account of the great difficulty in determining the extent to which and the conditions under which recourse to obligatory arbitration might be recognized by the unanimous vote of the Powers and in a general treaty, the contracting Powers confine themselves to enumerating in an additional act, annexed to the present Convention, such cases as deserve to be taken into consideration in the free opinion of the respective Governments. This additional act shall be binding only upon such Powers as sign it or adhere to it.

(Here follow the articles of the old Convention of 1899, with the modifications adopted by the First Commission.)

B.—*Additional act to the Convention*

Preamble. Considering that Article 16 (38) of the Convention of 1899 for the pacific settlement of international disputes sets forth the agreement of the signatory Powers to the effect that in legal questions, and especially in the interpretation and application of international conventions, arbitration is recognized as the most effective and at the same time most equitable means of settling disputes which diplomacy has failed to settle;

Considering that arbitration should be made obligatory in differences of a legal nature which, in the free opinion of the contracting Powers, do not involve their vital interests, their independence, or their honor;

Considering the usefulness of indicating in advance the kinds of disputes in which the above-mentioned reservations are not admissible;

The Powers signing this additional act have agreed upon the following provisions:

Article 16 *d*. ARTICLE 1

In this class of questions, they agree to submit to arbitration without reserve the following differences:

1. Disputes concerning the interpretation and application of conventional stipulations relating to the following matters: (*a*), (*b*), (*c*), (*d*), etc., etc., etc.

[915] ARTICLE 2

New. The signatory Powers engage to ratify this additional act before the first of January, 1909, and, in the act of ratification, to indicate precisely the kind of differences with respect to which they accept obligatory arbitration.

ARTICLE 3 and following

(Text voted for Articles 16 *e*, etc.)

Annex 47

PROPOSITION OF THE DELEGATION FROM URUGUAY

Draft of a declaration concerning a court for obligatory arbitration

Whereas it has been impossible to establish and maintain peace and justice among the associations of individuals of which nations are composed, except through the right which part of these individuals have assumed to impose these benefits upon all;

Whereas likewise justice and peace will not triumph nor be established in a systematic and permanent manner in the association of nations until a part thereof, sufficiently numerous and powerful, resolve for the benefit of all to ensure international justice which is the basis of peace;

Whereas we may hope from the progress of public opinion that at a time not far distant it may be possible to secure this agreement among large and small Powers sufficient in number to combine the indispensable prestige of the law with the necessary force, and whereas it is suitable in any case to mark the proper course;

With the desire to conform to the history of the efforts which the diplomacy of its country has made at all times in favor of the adoption of arbitration as the only and obligatory solution for disputes among nations, the delegation of the Oriental Republic of Uruguay presents for the consideration of the Second Peace Conference the following four declarations:

1. As soon as ten nations (of which half shall have at least 25,000,000 inhabitants each) shall agree to submit to arbitration differences which may arise among them, they shall have the right to form an alliance for the purpose of examining the disagreements and disputes which may arise among them and to intervene when they deem it advantageous to secure the most just solution.

2. The allied nations may establish a court of obligatory arbitration at The Hague (if the Kingdom of Holland is a party to the alliance) or in another city designated for that purpose.

3. The alliance in favor of obligatory arbitration shall intervene only in cases of international disputes, and shall not interfere in the internal affairs of any country.

4. All nations which shall conform to the principle of obligatory arbitration shall have the right to become parties to the alliance intended to abolish the evils of war.

[916]

ORDINARY PUBLIC DEBTS

Annex 48

PROPOSITION OF THE DELEGATION OF THE UNITED STATES OF AMERICA [1]

For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin, arising from contract debts, which are claimed as due to the subjects or citizens of one country by the Government of another country, and in order to guarantee that all contract debts of this nature which it may have been impossible to settle amicably through the diplomatic channel shall be submitted to arbitration, it is agreed that there cannot be recourse to any coercive measure involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the creditor and refused or not answered by the debtor, or until arbitration has taken place and the debtor State has failed to comply with the award made.

It is further agreed that such arbitration shall conform, as to its procedure, to Chapter III of the Convention for the pacific settlement of international disputes, adopted at The Hague, and that it shall determine the equity and the amount of the debt, the time and manner of its settlement and the guaranty to be given, if there is occasion, while payment is delayed.

Annex 49

PROPOSITION OF THE DELEGATION OF HAITI

The Haitian delegation requests permission to call the kindly attention of the Second Peace Conference to the following point of the Arbitration Convention of 1899:

PECUNIARY CLAIMS

Moved by conflicts dangerous for peace, most often provoked by claims which an impartial examination would not fail to reduce to their just proportions, the Congress of American Republics at Mexico has decided to submit to
[917] arbitration all demands for damages and pecuniary losses which cannot be settled through the diplomatic channel.

The delegation of Haiti does not believe it an exaggeration to state here that more than one of the regrettable misunderstandings between the Old and the New World originated in claims presented for damages and pecuniary losses. And the solutions adopted, however just they may have appeared to those who

[1] See also annexes 50 and 59.

had recourse to them, have left, because of the procedure often employed, resentments little calculated to establish harmony on a durable basis; resentments which might have been avoided by asking a just settlement by arbitration. In this kind of controversy, there are, in fact, almost always accounts to be verified and figures to examine. And impartial judges, in fixing the amount of the damages suffered and the losses sustained, would not provoke any bitterness in the hearts of those that they would condemn. Therefore, arbitration seems clearly to be the means for the settlement of this kind of difficulty.

Consequently, the delegation of Haiti proposes to give the following form to Article 16:

ARTICLE 16

In questions concerning the interpretation or the application of international treaties, in questions of a legal nature, *as also in claims for damages and pecuniary losses,* arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means for settling disputes which diplomacy has failed to settle.

Annex 50

PROPOSITION OF THE DELEGATION OF THE UNITED STATES OF AMERICA [1]

(New draft)

For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin, arising from contract debts, which are claimed from the Government of one country by the Government of another country as due to its subjects or citizens, and in order to guarantee that all contract debts of this nature which it may have been impossible to settle amicably through the diplomatic channel shall be submitted to arbitration, it is agreed that there cannot be any recourse to a coercive measure involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the claimant and refused or not answered by the debtor State, or until arbitration has taken place and the debtor State has failed to comply with the award made.

It is further agreed that such arbitration shall conform, as to its procedure, to Chapter III of the Convention for the pacific settlement of international disputes, adopted at The Hague, and that it shall determine the justice and the amount of the debt, the time and manner of its settlement and the guaranty to be given, if there is occasion, while payment is delayed.

[1] See also annexes 48 and 59.

[918]

Annex 51

PROPOSITION OF THE DELEGATION OF THE DOMINICAN REPUBLIC

Amendment to the proposition of the delegation of the United States of America [1]

With a view to avoiding armed conflicts between nations, all claims of a purely pecuniary origin, whether proceeding from public loans or other contract debts, or from damages and losses, when presented by a Government in the name of its nationals, shall be submitted to international arbitration whenever it may not have been possible to settle them amicably through the diplomatic channel. No coercive measure, involving the employment of military or naval forces can be taken against the debtor State unless it refuses the arbitration proposed by the claimant State, or fails to submit to the award made by the arbitral tribunal.

It is further agreed that this arbitration shall determine the justice and the amount of the claims, the time and manner of their settlement, conforming as to procedure with the rules of Chapter III of the Convention for the pacific settlement of international disputes, adopted at The Hague.

Annex 52

PROPOSITION OF THE DELEGATION OF CHILE

The delegation of Chile, inspired by the desire to seek means of conciliation for the pacific settlement of the disagreements which most often appear in the ordinary course of international relations, has the honor to submit the following proposition to the consideration of the Conference:

The contracting parties engage to submit to arbitration all claims of subjects or citizens of one State against another State, in such cases as negotiations through the diplomatic channel are unable to bring about a satisfactory agreement, and when the claims are of a pecuniary character, proceeding from damages and interest, or from the breach of contracts in which the contracting parties themselves cannot determine the authority and the procedure to which they should appeal to settle future disagreements.

The contracting parties likewise engage to submit to the Hague tribunal the final resolution of the questions or difficulties mentioned, in case they do not consider it preferable to agree to the establishment of a special tribunal for the settlement of the question.

[1] Annex 50; see also annex 57.

[919]

Annex 53

PROPOSITION OF THE DELEGATION OF PERU

Amendment to the proposition of the delegation of the United States of America [1]

The principles established in this proposition cannot be applied to claims or controversies arising out of contracts made by the Government of a country with foreign subjects, when in these contracts it is expressly stipulated that these claims or controversies should be submitted to the judges of the tribunals of the country.

Annex 54

DECLARATION OF THE DELEGATION OF THE UNITED STATES OF VENEZUELA

The delegation of the United States of Venezuela has the honor to communicate to the first subcommission of the First Commission the principles which it proposes to outline in the course of the discussion on the various propositions concerning pecuniary claims.

For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin,

I

It is agreed that differences arising from claims of subjects or citizens of one State against another State for the breach of contracts, shall be submitted to the Permanent Court of Arbitration at The Hague when the parties themselves have not stipulated in their contract that every difference or controversy shall be settled before the tribunals and under the laws of the responsible State.

II

It is agreed that recourse shall be had to the Permanent Court of Arbitration in differences between States on the subject of claims for damages and losses not arising from contracts, when the justice and the amount of the claims cannot be settled through the diplomatic channel or before the tribunals of the responsible State.

III

It is agreed that the said claims shall, in all cases, be settled by pacific means, without any recourse to coercive measures involving the employment of military or naval forces.

[1] Annex 50.

[920]

Annex 55

PROPOSITION OF THE DELEGATION OF ROUMANIA

The delegation from Roumania in the name of the Royal Government has the honor to propose that the proposition of the delegation of the United States of America concerning the limitation of the employment of force for the recovery of public debts, be not inserted as a new article in the Convention for the pacific settlement of international disputes of 1899, but that it form the subject of a special agreement among the interested Powers without connection with that Convention.

Annex 56

DECLARATION OF THE DELEGATION OF THE REPUBLIC OF SALVADOR

The delegation of the Republic of Salvador adheres to the amendment presented by the delegation of the United States, with the following reservations:

1. That in the matter of debts arising from ordinary contracts between States and individuals, recourse shall not be had to arbitration except in the cases of denial of justice, after all the legal remedies of the contracting country have first been exhausted.
2. That public loans constituting national debts can never give rise to military aggressions or to a material occupation of the territory of the American nations.

Annex 57

COMMENT OF THE DELEGATION OF THE DOMINICAN REPUBLIC

On the proposition of the United States of America [1] *relative to the term contract debts, therein employed, presented by* Mr. Apolinar Tejera *to the committee of examination of the first subcommission of the First Commission* [2]

The proposition of the United States of America already known under the title of *Proposition of General Porter,* and voted on, in principle, at the meeting of July 27, speaks only of *contract debts.*

Shall this expression indicate any pecuniary claim whatever, arising either

[1] Annex 50.
[2] See also annex 51.

[921] from a public loan or other contract; or shall it be limited to claims originating with the non-fulfillment of every contract that is not a public loan?

In the heading of the North American proposition one reads: "ordinary public debts having their origin in contracts."

It is well known that, in international law, there can exist between States two distinct kinds of pecuniary claims arising from a contract; those arising from public loans and those issuing from a concerted convention between the State and the individuals.

Neither is one ignorant of the fact that, in the first case, the State performs an act of sovereignty, the public loans being, consequently, contracts of a special nature, because for their form and their validity they require the sanction of the sovereignty of the State. In the other case, on the contrary, the State performs only an administrative act; the contract it makes is of a purely civil character, and it assumes, in its capacity of a juridical person, also purely civil, a direct and immediate responsibility toward the other party, from the moment that it breaks the stipulations agreed upon.

With this distinction of doctrine established, the consequences of the two cases are by no means identical.

When the State proceeds as a sovereign entity, it devolves upon it only to decide and fix what corresponds to the public debt, before and after its emission, as an exclusive act of its internal sovereignty, without any other sovereignty having the right to interfere, under any pretext, in the subsequent results.

This thesis, still much disputed, is that of Dr. DRAGO, our distinguished colleague; in his address of July 18, so justly and loudly applauded, he himself declared that this was the doctrine of the Argentine Republic, a doctrine *which excludes from the American continent all military operations and territorial occupation caused by public loans.* Up to the present this has been more a principle of militant policy than of international law.

Putting aside those claims arising from a public loan, there still remain those produced by all other contracts made between a State, acting as a civil person, and an individual. Would these, then, be the contract debts contemplated by the proposition of General PORTER?

As international claims, according to their extraction, are always separated, as arising from a public loan or from contracts of another kind, the amendment to the proposition of General PORTER, which the delegation of the Dominican Republic has had the honor to present, tends, as its text shows, to classify the said claims, for the greater clearness and precision of the subject, in order to avoid in advance all discussions and interpretations which may arise in this matter, when the cases present themselves.

According to the system of the amendment of the delegation of the Dominican Republic, which has for its purpose the avoidance of armed conflicts having a purely pecuniary origin, whatever may be the cause—public loans, contract debts, or indemnifications for losses and damages,—if the claim preferred by the State whose *ressortissants* believe themselves wronged cannot be settled through the diplomatic channel, the question would be submitted to a tribunal of arbitration. The proposition of General PORTER, in the form expressed, is less explicit, or it appears so, notwithstanding the fact that it treats of such important and grave questions. As we have already said, *ordinary public debts* are mentioned in the heading. In his detailed statement of July 16, he (General PORTER) first says that it is necessary to state precisely, although briefly, the character and

[922] scope of the American proposition, which embraces only those claims

founded on contracts between a State and the individuals of another country, and which excludes all claims arising from damages caused to strangers, for example, unjust imprisonment, mob violence, inhuman treatment, the confiscation of property and acts of flagrant injustice. It can then be asked if General PORTER, as well as Dr. DRAGO, admits that there can be no occasion for international claims when a State suspends the service of a public loan, on account of motives which that State, in the exercise of its internal sovereignty, alone can appreciate? Or, according to General PORTER, are the obligations created by a loan, as well as those arising from other agreements, of the same legal nature as regards the responsibility of the State, and consequently are they both, without distinction, included in the general term of contract debts? Or, once more, does General PORTER mean only the contracts of a private character made by the State in its quality of a civil person, and does the American proposition not include public loans and their consequences? In his communication to the Commission, General PORTER speaks of the onerous conditions imposed by the lender, showing that he is aware of the risk he runs with his money; the extremely low price at which the bonds of the debtor State are bought, despite the fact that full payment is exacted afterward; of the disposition evinced by a certain class of people to speculate with the necessities of a government that is weak and short of money, counting naturally on their own Government to assure the complete success of their transaction; of adventurous speculators who tempt certain Governments by offering them large loans of money, afterward threatening them with the seizure of their resources, with acts which outrage the sovereignty of the State; and he also cites the declarations of Lord PALMERSTON, of Lord RUSSELL, and of Lord SALISBURY relating to financial operations; also those, more categoric, of HAMILTON, the remarkable American statesman, whom WASHINGTON honored with his personal esteem, which were thus couched: "contracts between a nation and individuals are obligatory according to the conscience of the sovereign, and may not be the object of coercive measures, nor accord any right of action contrary to its will"; finally, the doctrine of DRAGO. Notwithstanding these considerations, the terms of the American proposition, *contract debts,* are undoubtedly very vague as to the legal meaning of the point under discussion.

This matter being very delicate and, moreover, exposed to all kinds of interpretation, to the grave and manifest detriment of small States, the delegation of the Dominican Republic considers it indispensable to fix the complete and exact sense of the proposition which is to be instituted as a rule of international conduct by the Second Peace Conference, wherein are assembled the representatives of the majority of civilized peoples whose purpose is to lay the corner stone of contemporary and future international law, and to prevent by all the means in their power acts of force, always disastrous and frightful. To work as much as possible for the benefit of world peace,—this is the true and humane task of the Conference, united to prepare peace for the world, replacing, as General PORTER so well expressed it, the sinister science of destruction by the fruitful arts of universal concord.

[923]

Annex 58

PROPOSITION OF THE DELEGATION OF MEXICO

Amendment to the proposition of the United States of America [1]

Add after the words, "*through the diplomatic channel*" the words, "*when it proceeds according to the principles of international law.*"

Annex 59

PROPOSITION OF THE DELEGATION OF THE UNITED STATES OF AMERICA [2]

(New draft of August 29, 1907)

In order to prevent armed conflicts between nations, of a purely pecuniary origin growing out of contract debts claimed from the Government of one country by the Government of another country as due to its nationals, the signatory Powers agree not to resort to armed force for the collection of such contract debts.

This stipulation, however, shall not apply when the debtor State rejects or ignores a proposal of arbitration, or, in case of acceptance, makes it impossible to establish the *compromis,* or, after arbitration, fails to comply with the award.

It is further agreed that the arbitration here considered shall conform to the procedure provided by Chapter III of the Convention for the pacific settlement of international disputes adopted at The Hague, and that it will determine, in so far as the parties should not have agreed thereupon, the justice and the amount of the debt, the time and mode of settlement.

[1] Annex 50.
[2] See also annexes 48 and 50.

[924]

DOCUMENTS LAID BEFORE THE CONFERENCE

Annex 60

COMMUNICATION OF THE DELEGATION OF MEXICO

Treaty of arbitration for the settlement of disputes arising out of pecuniary claims, signed at Mexico, January 30, 1902

Their Excellencies the Presidents of the Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, the United States of America, Guatemala, Haiti, Honduras, the United Mexican States, Nicaragua, Paraguay, Peru, and Uruguay.

Desiring that their respective countries should be represented at the Second International American Conference, sent thereto duly authorized to approve the recommendations, resolutions, conventions, and treaties that they might deem convenient for the interests of America, the following delegates: . . .

Who, after having communicated to each other their respective full powers and found them to be in due and proper form, excepting those presented by the representatives of their Excellencies the Presidents of the United States of America, Nicaragua, and Paraguay, who act *ad referendum,* have agreed to celebrate a treaty to submit to the decision of arbitrators pecuniary claims for damages that have not been settled by diplomatic channel, in the following terms:

ARTICLE 1

The high contracting Parties agree to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels and when said claims are of sufficient importance to warrant the expenses of arbitration.

ARTICLE 2

By virtue of the faculty recognized by Article 26 of the convention of The Hague for the pacific settlement of international disputes, the high contracting Parties agree to submit to the decision of the Permanent Court of Arbitration established by said convention, all controversies which are the subject-matter of the present treaty, unless both Parties should prefer that a special jurisdiction be organized, according to Article 21 of the convention referred to.

If a case is submitted to the Permanent Court of The Hague, the high contracting Parties accept the provisions of the said convention, in so far as they relate to the organization of the arbitral tribunal, and with regard to the procedure to be followed, and to the obligation to comply with the sentence.

[925]

ARTICLE 3

The present treaty shall not be obligatory except upon those States which have subscribed to the convention for the pacific settlement of international disputes, signed at The Hague, July 29, 1899, and upon those which ratify the

protocol unanimously adopted by the republics represented in the Second International Conference of American States, for their adherence to the conventions signed at The Hague, July 29, 1899.

ARTICLE 4

If, for any cause whatever, the Permanent Court of The Hague should not be opened to one or more of the high contracting Parties, they obligate themselves to stipulate, in a special treaty, the rules under which the tribunal shall be established, as well as its form of procedure, which shall take cognizance of the questions referred to in Article 1 of the present treaty.

ARTICLE 5

This treaty shall be binding on the States ratifying it, from the date on which five signatory Governments have ratified the same, and shall be in force for five years. The ratification of this treaty by the signatory States shall be transmitted to the Government of the United States of Mexico, which shall notify the other Governments of the ratifications it may receive.

In testimony whereof the plenipotentaries and delegates also sign the present treaty, and affix the seal of the Second International American Conference.

Made in the city of Mexico the thirtieth day of January nineteen hundred and two, in three copies, written in Spanish, English, and French, respectively, which shall be deposited with the Secretary of Foreign Relations of the Mexican United States, so that certified copies thereof be made, in order to send them through the diplomatic channel to the signatory States.

On August 13, 1906, at Rio de Janeiro, the representatives of all the States participating in the Third International American Conference signed a convention extending the treaty of Mexico to December 31, 1912. In this same convention it was also agreed to suppress Article 3 of the aforesaid treaty.

Annex 61

REGULATIONS PROVIDED FOR BY ARTICLE 3 OF THE DECLARATION OF NOVEMBER 12/25, 1904

A.—*Composition of the general secretariat of the international commission of inquiry*

The president of the commission shall be assisted by a secretary general, invested with the following functions:

To see that shorthand reports of the meetings are taken;

To superintend the execution of all necessary translations;

[926] To collect and file all documents handed to the commission;

To enter into relations with the embassies in all matters of interest to the commission;

To communicate to the newspapers reports drawn up in the manner indicated in Article 9 of title B; and

Generally, to insure, under the direction of the president, all the auxiliary working departments of the commission.

A person authorized by each of the embassies of the high contracting Parties shall, if possible, give his assistance to the secretary general.

B.—*Meetings of the commission*

1

The meetings of the commission shall be public or not public according to their object.

2

The meetings shall be public (1) when the statements of facts are made by the agents of the contracting Parties and the examination of the witnesses take place; (2) when the agents make known their conclusions; (3) and when at the last meeting the commission shall have delivered the result of its deliberations.

3

No other meetings of the commission entailing deliberations shall be public.

4

The following will be allowed to attend the private meetings of the commission:

Assessors of the commissioners;

The agents appointed by the Powers who have signed the declaration and their counsel;

Persons authorized or summoned by the commission;

Members of the secretariat general;

Assistants and secretaries of the commissioners.

5

The commissioners and all the persons mentioned in the preceding article shall, when the commission is meeting, occupy the places indicated in the plan annexed hereto.

6

The publicity of the meetings shall be regulated as follows:

An equal number of places will be reserved for the press of each of the commissioners' countries.

A number at least equivalent to that above mentioned will be reserved for the whole press of other countries.

[927] Also a certain number of entrance tickets will, through the secretariat general, be placed at the disposal of each of the commissioners for each public meeting.

7

The stenographic reports of the meetings shall be made under the direction of the secretariat general.

They will be filed in the archives of the commission only after having been

read over and approved by each of the persons who shall have spoken, except that depositions of witnesses shall be deposited in the archives of the commission in the manner specified in Article 7 of title E.

8

After each sitting, the president, assisted by the staff of the secretary general, will draw up a minute stating briefly the work done.

If necessary, this minute shall be read and corrected at the beginning of the next meeting. It shall be signed by the president, the two agents, and by the secretary general, and drawn up in ten copies, one of which shall be filed in the archives of the commission, and the others handed to each of the commissioners, assistants, and agents.

9

Lastly, a short report of the public meetings for the use of the press shall be drawn up in accordance with the instructions given by the president of the commission with the approval of the commissioners.

10

The official language of the commission is French. However, the witnesses will be allowed to make their depositions in their own language. Every document handed to the commission drawn up in any language but French, shall be accompanied by a French translation.

C.—*Meetings of the commission in the council chamber*

1

During the meetings, the commissioners will retire into their council chamber as often as they deem fit.

2

In principle, no persons other than the assessors shall be allowed to be present at the commissioners' deliberations which are held in the council chamber.

Nevertheless, the commissioners may call in temporarily any person entitled to attend the meetings of the commission for the purpose of giving supplementary information or advice.

3

Deliberations in the council chamber between the commissioners and the assessors shall not be published.

Decisions resulting therefrom will be communicated, if deemed fit, at the open meetings.

[928]

D.—*Statement of facts*

1

The agents of the high contracting Parties will proceed with the statement of the facts which are the subject of the examination carried on by the commission of inquiry.

These agents will be allowed to have the assistance of jurists, counsel, or advocates, whose names shall be previously submitted to and approved by the commission.

2

The statement of the facts submitted for examination by the international commission of inquiry shall be presented, first, by the agent of the Government of his Britannic Majesty, secondly, by the agent of the Government of His Majesty the Emperor of Russia.

3

These statements as well as the documents accompanying them shall be submitted in writing and simultaneously, at least two days before they are read at a public meeting. No alteration can be made therein after they are submitted.

E.—*Witnesses*

1

Witnesses shall be cited before the commission *ex-officio* or at the request of the Parties.

2

The witnesses whom the high contracting Parties will produce before the commission, or whom the latter will cite, shall be examined conformably to the following articles of the present section (*titre*).

3

Before being heard, each witness shall declare his name, age, nationality, residence and occupation, and state whether or not he is in the service of one of the Parties. He will be requested to take an oath, or to declare on his honor that he will tell the whole truth, or to make a solemn affirmation thereof.

The oath, declaration upon honor, solemn affirmation, or refusal will be recorded in the minute of the deposition.

[4 ?]

Written depositions of witnesses unable to appear within a brief period will be accepted *à titre de documents*.

5

Any witness who refuses or is unable to appear will be allowed to give his evidence to the competent authorities of his dwelling place, on questions set by the commission.

6

The assessors and agents will have entire freedom in carrying on the examination of the witnesses.

[929] As regards the jurists, counsel, or advocates, they will not be allowed to address any questions directly to witnesses without having communicated the terms thereof to the president.

7

The shorthand report of every deposition shall be accepted as an official report; the secretary general will have it afterwards transcribed and read to the witness, who will sign it. If the witness declares that he refuses or is unable to sign, this will be mentioned in the report of the deposition.

Depositions elicited by the commissioners and made in any other than the French language will be deposited in the archives of the commission together

with their French translations made under the direction of the secretary general.

Depositions elicited by the agents of the high contracting Parties and made in any other than the French language will be handed to the secretary general, together with their French translations, approved by the agent who elicited such testimony.

8

No witness shall be heard more than once on the same facts, except by the consent of the commission, or in order to be confronted with another witness whose evidence contradicts his.

Witnesses shall make their deposition without interruption, and without being allowed to read any written draft. Nevertheless, they may be authorized by the president to refer to memoranda or documents, if the nature of the facts testified to should render it necessary.

F.—*Conclusions and report*

1

When the commissioners have exhausted all means of information, each agent will be at liberty to submit in writing the conclusions and observations which he wishes to submit to the commission.

These conclusions and observations will be read by the agents at a public meeting.

2

After the public meeting at which the reading of the conclusions and observations of the agents takes place, the commissioners will proceed to deliberate, in the council chamber, as to the conclusions to be drawn from the debates, and to draw up the report provided for in Article 6 of the declaration of November 12/25, 1904.

G.—*Dates and hours of meetings*

The commission will itself fix, at the end of each of its meetings, the date and hour of the following meeting.

[930]

Annex 62

TEXT OF THE RESOLUTION ADOPTED AUGUST 7, 1906, BY THE THIRD INTERNATIONAL AMERICAN CONFERENCE OF RIO DE JANEIRO, AND PRESENTED BY THE DELEGATION OF BRAZIL

Arbitration

The undersigned, delegates of the republics represented in the Third International American Conference, duly authorized by their Governments, have approved the following Resolution:

The Third International American Conference resolves:

To ratify adherence to the principle of arbitration; and to the end that so high a purpose may be rendered practicable, to recommend to the nations represented at this conference that instructions be given to their delegates to the second conference to be held at The Hague, to endeavor to secure by the said assembly, of world-wide character, the celebration of a general arbitration convention, so effective and definite that, meriting the approval of the civilized world, it shall be accepted and put in force by every nation.

Made and signed in the city of Rio de Janeiro, on the seventh day of the month of August nineteen hundred and six, in English, Spanish, Portuguese and French, and deposited in the Department of Foreign Affairs of the Government of the United States of Brazil, in order that certified copies thereof be made, and forwarded through diplomatic channels to each one of the signatory States.

[931]

Annex 63

GENERAL TREATY OF ARBITRATION WITH PARAGUAY

The Governments of the Argentine Republic and of the Republic of Paraguay, being animated by the common desire to arrange by amicable means any question which may arise between the two countries, have resolved to draw up a general treaty of arbitration, for which purpose they nominate as their plenipotentiaries, namely:

His Excellency the President of the Argentine Republic, his Envoy Extraordinary and Minister Plenipotentiary to the Republic of Paraguay, Don Lauro Cabral; and

His Excellency the President of the Republic of Paraguay, his Minister for the Department of Foreign Affairs, Don José S. Decoud;

Who, having communicated their full powers, which were found to be in good and due form, have agreed upon the following articles:

Article 1

The high contracting Parties undertake to submit to decision by arbitration all controversies of whatever nature which, for any cause whatsoever, may arise between them, in so far as they do not affect the principles of the constitution of either country, and provided always that they cannot be settled by means of direct negotiations.

Article 2

Questions which may have been the object of definite agreements between the contracting Parties cannot be reopened by virtue of this treaty. In such cases arbitration shall be limited exclusively to the questions which may arise respecting the validity, interpretation, and fulfillment of such agreements.

ARTICLE 3

In every case which occurs the arbitration tribunal shall be constituted which is to decide the controversy raised.

If there should be a disagreement respecting the constitution of the tribunal, the latter shall be composed of three judges. Each State shall name an arbiter, and these shall designate a third. If they should be unable to agree upon that designation, it shall be made by a chief of a third State who shall be indicated by the arbiters named by the Parties. Should they be unable to agree as to this latter nomination, the President of the Swiss Confederation shall be invited to designate him. The arbiter thus selected shall be of right president of the tribunal.

A person cannot be named as third arbiter who has already given a decision in that capacity in a case of arbitration in accordance with this treaty.

[932] ARTICLE 4

No one of the arbiters shall be a citizen of the contracting States or domiciled in their territory. Neither shall he have an interest in the questions submitted to arbitration.

ARTICLE 5

In case of one or more of the arbiters declining, withdrawing, or being otherwise prevented from acting, substitutes shall be found in the same manner as that adopted for their nomination.

ARTICLE 6

The points at issue shall be indicated by the contracting States, who shall also be able to determine the scope of the arbiters' powers, and any other circumstance relating to the procedure.

ARTICLE 7

In default of special stipulations between the Parties, it shall be incumbent on the tribunal to fix the time and place of its sessions outside the territory of the contracting States, to select the language to be employed, to determine the methods of proof, the formalities and terms to be prescribed to the Parties, the procedure to be followed, and in general to take all measures necessary for the exercise of its functions, and to settle all the difficulties of procedure which might arise in the course of the debate.

The litigants undertake to furnish the arbiters with all the means of information at their disposal.

ARTICLE 8

Each of the Parties shall be able to appoint one or more mandatories to represent it before the arbitration tribunal.

ARTICLE 9

The tribunal is competent to decide upon the regularity of its own constitution, and upon the validity and interpretation of the agreement. It is equally competent to decide disputes which may arise between the litigants as to whether questions determined by it were or were not points submitted to jurisdiction by arbitration in the written agreement.

ARTICLE 10

The tribunal shall decide in accordance with the principles of international law, unless the agreement calls for the application of special rules, or authorizes the arbiters to decide in the character of friendly advisers.

ARTICLE 11

A tribunal shall not be able to be formed without the concurrence of the three arbiters. In case the minority, when duly cited, should not be willing to attend the deliberations or other proceedings, the tribunal shall be formed by the majority of the arbiters only, who shall record the voluntary and unjustified absence of the minority.

The decision of the majority of the arbiters shall be accepted as the
[933] award; but if the third arbiter does not accept the opinion of either of the arbiters named by the Parties, his decision shall be final.

ARTICLE 12

The award shall decide definitely each point in litigation and shall set forth the grounds on which it is based.

It shall be drawn up in duplicate and signed by all the arbiters. If anyone of them should refuse to sign it, the others shall mention that circumstance in a special protocol, and the award shall take effect whenever it is signed by the majority of the arbiters. The dissenting arbiter shall confine himself to recording his dissent when the award is signed, without stating his reasons.

ARTICLE 13

The award shall be notified to each of the Parties through the medium of its representative on the tribunal.

ARTICLE 14

The award legally pronounced decides within the limits of its scope the controversy between the Parties.

ARTICLE 15

The tribunal shall determine in its award the period within which it shall be executed, being also competent to decide the questions which may arise with reference to its execution.

ARTICLE 16

There is no appeal against the award, and its fulfillment is confided to the honor of the nations who have signed this compact.

Nevertheless, an appeal will be allowed for revision before the same tribunal which pronounced it, provided it is lodged before the lapse of the period assigned for the execution, in the following cases:

1. If the award has been pronounced in consequence of a document having been falsified or tampered with;

2. If the award has been in whole or in part the consequence of an error of fact resulting from the arguments or documents of the case.

ARTICLE 17

Each of the Parties shall pay its own expenses and half the general expenses of the tribunal of arbitration.

ARTICLE 18

The present treaty shall remain in force ten years, dating from the exchange of ratifications. If it should not be denounced six months before the lapse of that period, it shall be considered to be renewed for another space of ten years, and so on.

The present treaty shall be ratified, and the ratifications shall be exchanged in Asuncion within six months of the date of the same.

[934] In virtue of which the plenipotentiaries of the Argentine Republic and of the Republic of Paraguay have signed the present treaty in duplicate, and sealed it with their respective seals, in the city of Asuncion, on the 6th day of November, in the year 1899.

(Signed) LAURO CABRAL.
JOSÉ S. DECOUD.

TREATY OF ARBITRATION WITH URUGUAY

The Governments of the Argentine Republic and of the Republic of Uruguay, being animated by the common desire to arrange by amicable means any question which may arise between the two countries, have resolved to draw up a general treaty of arbitration, for which purpose they nominate as their plenipotentiaries, to wit:

His Excellency the President of the Argentine Republic, his Minister in the Department of Foreign Affairs and Religion, Dr. Don AMANCIO ALCORTA; and

His Excellency the President of the Republic of Uruguay, his Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic, Dr. Don GONZALO RAMIREZ;

Who, having communicated their full powers, which were found to be in good and due form, agreed upon the following articles:

ARTICLE 1

The high contracting Parties undertake to submit to decision by arbitration all controversies of whatever nature which for any cause whatsoever may arise between them, in so far as they do not affect the principles of the constitution of either country, and provided always that they cannot be settled by means of direct negotiations.

ARTICLE 2

Questions which may have been the object of definitive agreements between the contracting Parties cannot be reopened by virtue of this treaty. In such cases arbitration shall be limited exclusively to the questions which may arise respecting the validity, interpretation and fulfillment of such agreements.

[935] ARTICLE 3

In every case which occurs the arbitration tribunal shall be constituted to decide the controversy raised. If there should be disagreement respecting the con-

stitution of the tribunal the latter shall be composed of three judges. Each State shall name an arbiter, and these shall designate the third. If they should be unable to agree upon that designation, it shall be made by the chief of a third State who shall be indicated by the arbiters named by the Parties. Should they be unable to agree as to this latter nomination the President of the French Republic shall be invited to designate him. The arbiter thus selected shall be of right president of the tribunal.

A person cannot be named as third arbiter who has already given a decision in that capacity in a case of arbitration, in accordance with this treaty.

ARTICLE 4

No one of the arbiters shall be a citizen of the contracting States or domiciled in their territory. Neither shall he have an interest in the questions submitted to arbitration.

ARTICLE 5

In case of one or more of the arbiters declining, withdrawing or being otherwise prevented from acting, substitutes shall be found in the same manner as that adopted for their nomination.

ARTICLE 6

The points at issue shall be indicated by the contracting States who shall also be able to determine the scope of the arbiters' powers and any other circumstance relating to the procedure.

ARTICLE 7

In default of special stipulations between the Parties, it shall be incumbent on the tribunal to fix the time and place of its sessions outside the territory of the contracting States, to select the language to be employed, to determine the methods of proof, the formalities and terms to be prescribed to the Parties, the procedure to be followed, and, in general, to take all measures necessary for the exercise of its functions and to settle all the difficulties of procedure which might arise in the course of the debate.

The litigants undertake to furnish the arbiters with all means of information at their disposal.

ARTICLE 8

Each of the Parties may appoint one or more mandatories to represent it on the arbitration tribunal.

ARTICLE 9

The tribunal is competent to decide upon the regularity of its own constitution, and upon the validity and interpretation of the agreement. It is equally competent to decide disputes which may arise between the litigants as to whether questions determined by it were or were not points submitted to jurisdiction by arbitration in the written agreement.

[936] ARTICLE 10

The tribunal shall decide in accordance with the principles of international law unless the agreement calls for the application of special rules or authorizes the arbiters to decide in the character of friendly advisers.

ARTICLE 11

A tribunal shall not be formed without the concurrence of the three arbiters. In case the minority, when duly cited, should not be willing to attend the deliberations or other proceedings, the tribunal shall be formed by the majority of the arbiters only, who shall record the voluntary and unjustified absence of the minority.

The decision of the majority of the arbiters shall be accepted as the award, but if the third arbiter does not accept the opinion of either of the arbiters named by the Parties, his decision shall be final.

ARTICLE 12

The award shall decide definitely each point in litigation, and shall set forth the grounds upon which it is based.

It shall be drawn up in duplicate and signed by all the arbiters. If any one of them should refuse to sign it, the others shall mention that circumstance in a special protocol, and the award shall take effect whenever it is signed by the majority of the arbiters. The dissenting arbiter shall confine himself to recording his dissent when the sentence is signed without stating his reasons.

ARTICLE 13

The award shall be notified to each of the Parties through the medium of its representative on the tribunal.

ARTICLE 14

The award legally pronounced decides within the limits of its power the controversy between the Parties.

ARTICLE 15

The tribunal shall determine in its award the period within which it shall be executed, being also competent to decide the questions which may arise with reference to its execution.

ARTICLE 16

There is no appeal against the award, and its fulfillment is confided to the honor of the nations who have signed this compact.

Nevertheless, an appeal will be allowed for revision before the same tribunal which pronounced it, provided it is lodged before the lapse of the period assigned for the execution, in the following cases:

1. If the award has been pronounced in consequence of a document having been falsified or tampered with;

2. If the award has been in whole or in part the consequence of an error of fact resulting from the arguments or documents of the case.

[937] ARTICLE 17

Each of the parties shall pay its own expenses and half of the general expenses of the tribunal of arbitration.

ARTICLE 18

The present treaty shall remain in force ten years, dating from the exchange of ratifications. If it should not be denounced six months before the lapse of

that period, it shall be considered to be renewed for another space of ten years, and so on.

The present treaty shall be ratified, and the ratifications shall be exchanged in Buenos Aires within six months of its date.

In virtue of which the plenipotentiaries of the Argentine Republic and the Republic of Uruguay have signed the present treaty in duplicate and sealed it with their respective seals in the city of Buenos Aires, on the 8th day of June, 1899.

(Signed) Amancio Alcorta.
Gonzalo Ramirez.

GENERAL TREATY OF ARBITRATION WITH CHILE

The Governments of the Argentine Republic and of Chile, animated by a mutual desire of solving, by friendly means, any question which may arise between the two countries, have agreed to conclude a general treaty of arbitration, for which purpose they have constituted as their ministers plenipotentiary, namely:

His Excellency the President of the Argentine Republic, Don José Antonio Terry, Envoy Extraordinary and Minister Plenipotentiary of that country; and

His Excellency the President of the Republic of Chile, Don José Francisco Vergara Donoso, Minister of State in the Department of Foreign Affairs;

Who, after having exchanged their full powers, found in good and due form, have agreed to the stipulations contained in the following articles:

Article 1

The high contracting Parties bind themselves to submit to arbitration all controversies between them, of whatsoever nature they may be, or from whatever cause they may have arisen, except when they affect the principles of the constitution of either country, and provided that no other settlement is possible by direct negotiations.

[938]

Article 2

Questions which have already been the subject of definite settlement between the high contracting Parties cannot, in virtue of this treaty, be reopened. In such cases arbitration will be limited exclusively to the questions which may arise respecting the validity, the interpretation, and the fulfillment of such agreements.

Article 3

The high contracting Parties nominate as arbiter His Britannic Majesty's Government. If either of the Parties should break off friendly relations with the Government of His Britannic Majesty, in that event both Parties nominate as arbiter the Government of the Swiss Confederation.

Within the period of sixty days, dating from the exchange of ratifications, both Parties shall, jointly or separately, request His Britannic Majesty's Government, the arbiter in the first instance, and the Government of the Swiss Confederation, the arbiter in the second instance, to consent to accept the duty of arbiters conferred upon them by this treaty.

ARTICLE 4

The points, questions or differences involved shall be determined by the contracting Governments, who shall be able to define the scope of the arbiter's powers and any other circumstance relating to the procedure.

ARTICLE 5

In default of agreement either of the Parties shall be empowered to invite the intervention of the arbiter, whose duty it will be to determine the agreement, the time, place, and formalities of the proceedings, as also to settle any difficulties of procedure as to which disputes may arise in the course of the arbitration.

The contracting Parties undertake to place all the information in their power at the disposal of the arbiter.

ARTICLE 6

Each of the Parties shall be able to appoint one or more delegates to represent it before the arbiter.

ARTICLE 7

The arbiter is competent to decide upon the validity and interpretation of the agreement, as also to settle the disputes which may arise between the contracting Parties as to whether certain questions have or have not been submitted to jurisdiction by arbitration in the written agreement.

ARTICLE 8

The arbiter shall decide in accordance with the principles of international law, unless the agreement calls for the application of special rules or authorizes the arbiter to decide in the character of a friendly mediator.

ARTICLE 9

The award shall decide definitely each point in dispute, and the reasons for the same shall be stated.

[939] ARTICLE 10

The award shall be drawn up in duplicate, and shall be notified to each of the Parties by means of its representative.

ARTICLE 11

The award legally pronounced decides, within the limits of its scope, the dispute between the Parties.

ARTICLE 12

The arbiter shall fix in the award the time within which it shall be executed, and is competent to settle any questions which may arise with respect to its execution.

ARTICLE 13

There is no appeal against the award, and its fulfillment is entrusted to the honor of the nations who have signed this agreement. Nevertheless, recourse to

revision shall be allowed before the same arbiter who pronounced it, provided such action be taken within the time fixed for its execution and in the following cases:

1. If the award has been given on the strength of a document which has been falsified or tampered with;

2. If the award has been, in whole or in part, the consequence of an error of fact resulting from the arguments or documents of the case.

ARTICLE 14

Each of the Parties shall defray its own expenses and half the general expenses of the arbiter.

ARTICLE 15

The present treaty shall remain in force ten years, dating from the exchange of ratifications, and if it should not have been denounced six months before the date of its expiry, it shall be considered renewed for another ten years, and so on.

The present treaty shall be ratified, and the ratifications shall be exchanged in Santiago de Chile within six months of its date. In witness whereof the plenipotentiaries of the Argentine Republic and of the Republic of Chile have respectively signed and sealed the present treaty in duplicate, in the city of Santiago, on the 28th day of May, 1902.

(Signed) J. A. TERRY.
J. F. VERGARA DONOSO.

[940] TREATY OF ARBITRATION WITH SPAIN

The plenipotentiaries of the Argentine Republic to the Second International American Conference assembled at Mexico, and the envoy extraordinary and minister plenipotentiary of His Catholic Majesty to the United States of Mexico, duly authorized by their respective Governments to conclude *ad referendum* a treaty of arbitration for the purpose of the pacific settlement of all disputes tending to alter the friendly relations happily existing between the two States, have agreed upon the following provisions:

ARTICLE 1

The high contracting Parties agree to submit to arbitration all disputes, whatever be their nature, which for any reason may arise between them, exception being made of those affecting the constitutional prescriptions of one of the two States and of questions which can be solved by direct negotiation.

ARTICLE 2

Questions which have been definitively settled by the high contracting Parties shall not be revived in virtue of the present convention. Arbitration shall be applied exclusively, in this case, to the disputes arising with respect to the validity, interpretation or execution of the said arrangements.

ARTICLE 3

For the decision of questions which, in virtue of the present treaty, shall be submitted to arbitration, the duties of arbitrator shall devolve upon the chief

executive of one of the Spanish-American Republics or upon a tribunal composed of Spanish, Argentine, or Spanish-American experts or judges.

In case of disagreement as to designation of arbitrators the high contracting Parties shall have recourse to the Permanent International Court of Arbitration established conformably to the resolutions of the Conference assembled at The Hague in 1899, in which case, and in the case provided for in the preceding article, they shall follow the arbitral procedure specified in Chapter III of the said resolutions.

ARTICLE 4

The present convention shall remain operative for a period of ten years reckoned from the date of the exchange of ratifications. If one of the high contracting Parties does not declare its intention of denouncing the present treaty twelve months before its expiration, it shall continue in force for one year after its denunciation by one or the other of the high Parties.

ARTICLE 5

The present convention shall be submitted by the undersigned plenipotentiaries to their respective Governments for approval. This approval and the necessary ratification having been obtained according to the laws of the two States, the exchange of ratifications shall take place at Buenos Aires within a period of one year reckoned from this day.

[941] In faith of which the plenipotentiaries have signed it and attached their seals, the 28th day of January, 1902.

(Signed) ANTONIO BERMEJO.
LORENZO ANADON.
LE MARQUIS DE PRAT DE NANTOUILLET.

TREATY OF ARBITRATION WITH SPAIN

His Excellency the President of the Argentine Republic, on the one part, and His Majesty the King of Spain, on the other,

Equally desirous of solving pacifically all differences which might disturb the cordial and friendly relations which happily exist between the Argentine Republic and Spain;

Considering that differences have arisen and that the period fixed for the exchange of ratifications of the previous treaty concluded at Mexico has passed, have decided to negotiate *ad referendum* a new arbitration treaty, and to that end have duly authorized:

His Excellency the President of the Argentine Republic, his Minister Secretary of State in the Department of Foreign Relations and Worship, Dr. JOSÉ A. TERRY;

His Majesty the King of Spain, his Envoy Extraordinary and Minister Plenipotentiary to the Government of the Argentine Republic, Mr. JULIO DE ARELLANO, Grand Cross of the Order of Isabel the Catholic, Grand Cross of the Order of the Italian Crown and of the Conception of Villa Viciosa of Portugal, etc., etc.;

Who, after having communicated their full powers, found in good and due form, have agreed upon the following articles:

ARTICLE 1

The high contracting Parties agree to submit to arbitration all disputes, whatever be their nature, which for any reason may arise between them, exception being made of those which affect the constitutional prescriptions of one of the two States, as well as those questions which can be solved by means of direct negotiation.

ARTICLE 2

Questions which have been definitively settled by the high contracting Parties shall not be revived in virtue of the present convention.

[942] Arbitration shall, in this case, be applied exclusively to disputes arising with respect to the validity, interpretation or execution of the said agreements.

ARTICLE 3

There shall be a separate and distinct arbitral tribunal appointed to settle each dispute which may arise.

If there is disagreement regarding the composition of the tribunal, the latter shall be composed of three judges. Each of the two States shall designate an arbiter and the two arbiters shall nominate a third. If they are unable to agree on the subject of the said nomination, the decision shall rest with such State executive as shall be decided upon by the high Parties through the intermediary of their arbitrators. In case of disagreement upon this last designation, each of the two Parties shall delegate a different Power to choose this third arbitrator.

The arbitrator thus chosen shall be, of right, the president of the tribunal.

A person who has previously served on an arbitral tribunal and rendered an award as third arbitrator, conformably to the present treaty, shall not be designated to fulfill these duties.

ARTICLE 4

The arbitrators shall not be either citizens or subjects of the contracting States, or persons domiciled in their territories. Neither shall they be persons having any interest in the questions referred to arbitration.

ARTICLE 5

In case of non-acceptance, resignation or absence of one or more of the arbitrators, they shall be replaced by the same method as was employed in their nomination.

ARTICLE 6

The points in litigation shall be fixed by the contracting States, who shall likewise determine the extent of the powers of the arbitrators and all other matters relative to the procedure.

ARTICLE 7

In default of special stipulations between the Parties, the tribunal shall decide the time and place of its deliberations. The latter shall in all cases be outside the territories of the contesting States. It shall also devolve upon the tribunal to choose the language to be used, to determine the methods and order

of procedure, formalities and periods of time to be prescribed to the Parties, and, in general, to take such measures as are necessary to assure its proper operation and to solve all difficulties which may arise during the course of the debates. The contracting Parties agree to place all available information at the disposal of the arbitrators.

ARTICLE 8

Each of the Parties may appoint one or more attorneys to represent it before the arbitral tribunal.

[943] ARTICLE 9

The tribunal is competent to decide the regularity of its own constitution, the validity of the *compromis,* and its interpretation. It is equally competent to solve any disputes arising between the contestants as to whether or not certain questions have, within the terms of the *compromis,* come under the jurisdiction of the tribunal.

ARTICLE 10

The tribunal must render its award conformably to the principles of international law, unless the *compromis* imposes the application of special rules or authorizes the arbitrators to proceed as *amiables compositeurs.*

ARTICLE 11

The three arbitrators are necessary to the forming of the tribunal. In case the minority, duly convoked, does not wish to take part in the deliberations or in other phases of the procedure, the tribunal may proceed with only the majority of the arbitrators, who shall testify to the voluntary and unjustifiable non-assistance of the minority.

The decision of the majority shall be considered as the arbitral award, but if the third arbitrator does not accept the opinion of either of the arbitrators, his opinion shall prevail and shall have the authority of final judgment.

ARTICLE 12

The award shall be rendered definitively for each point in litigation, with an exposition of the reasons therefor.

It shall be drawn up in duplicate and signed by all the arbitrators. If one of the arbitrators refuses to sign it, his colleagues shall make a special record of that fact and the award shall be binding just the same if signed by the majority of the arbitrators. The dissenting arbitrator shall express his objections at the time of signature, but without stating the reasons therefor.

ARTICLE 13

The award shall be notified to the contestants through the intermediation of their representatives before the tribunal.

ARTICLE 14

The award when legally tendered shall settle, within the limit of its power, the dispute between the Parties.

ARTICLE 15

The tribunal shall stipulate in its award the period within which it shall be executed, and is competent to decide questions arising on the subject of its execution.

ARTICLE 16

The award is unappealable and its execution is left to the honor of the nations signatory to the present agreement.

[944] However it may be subjected to revision by the same tribunal which renders the decision before the expiration of the period fixed for its execution, if it is proved:

1. That the award has been made upon the exposition of a false document;

2. That the award has been, in whole or in part, the consequence of an error in fact resulting from the proceedings or documents in the case.

ARTICLE 17

Each of the Parties shall pay its own expenses plus half of the general expenses of the arbitral tribunal.

ARTICLE 18

The present treaty shall remain in force ten years reckoned from the day of the exchange of ratifications.

In case it is not denounced six months before its expiration, it shall be considered as renewed for a period of ten years, and so on.

The present treaty shall be ratified and the ratifications exchanged within six months from the date of signature.

In faith of which the plenipotentiaries of the Argentine Republic and Spain have signed the present treaty in duplicate and attached their seals.

Done at Buenos Aires, September 17, 1903.

(Signed) J. A. TERRY.
JULIO DE ARELLANO.

GENERAL TREATY OF ARBITRATION WITH BOLIVIA

The Governments of the Argentine Republic and of the Republic of Bolivia, animated by the common desire to settle by friendly means any question which may arise between the two countries, have resolved to negotiate a general treaty of arbitration, for which purpose they nominate as their plenipotentiaries, to wit:

His Excellency the President of the Argentine Republic, his Minister in the Department of Foreign Affairs and Worship, Dr. Don AMANCIO ALCORTA; and

His Excellency the President of the Republic of Bolivia, his Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic, Dr. Don JUAN C. CARRILLO;

[945] Who, having communicated their full powers, which were found to be in good and due form, agree upon the following articles:

ARTICLE 1

The high contracting Parties bind themselves to submit to arbitration all controversies, of whatever nature, which, for any cause whatsoever, may arise between them, in so far as they do not affect the constitutional prescriptions, and provided always that they cannot be solved by direct negotiations.

ARTICLE 2

Questions which have been the subject of definitive agreements between the Parties cannot be reopened in virtue of this treaty. In such cases, the arbitration shall be limited exclusively to questions arising on the validity, interpretation, and fulfillment of such agreements.

ARTICLE 3

In every case which occurs the arbitration tribunal shall be constituted to settle the controversy raised.

If agreement shall not be arrived at as to the constitution of the tribunal, the latter shall consist of three judges. Each State shall name an arbiter, and these shall designate a third. If they should not be able to agree upon this designation it shall be undertaken by the chief of a third State indicated by the arbiters nominated by the Parties. If they should not agree as to this last nomination, each Party shall designate a different Power, and the selection of the third arbiter shall be made by the two Powers thus designated.

The arbiter so selected shall be of right president of the tribunal.

A person cannot be named as third arbiter who has already given a decision in that capacity in a case of arbitration, in accordance with this treaty.

ARTICLE 4

No one of the arbiters shall be a citizen of the contracting States or domiciled in their territory. Neither shall he have an interest in the questions submitted to arbitration.

ARTICLE 5

In case of one or more of the arbiters declining, withdrawing, or being otherwise prevented from acting, substitutes shall be found in the same manner as that adopted for their nomination.

ARTICLE 6

The points at issue shall be indicated by the contracting States, who shall also be able to determine the scope of the arbiters' powers and any other circumstance relating to the procedure.

ARTICLE 7

In default of special stipulations between the Parties, it shall be incumbent
[946] on the tribunal to fix the time and place of its sessions outside the territory of the contracting States, to select the language to be employed, to determine the methods of proof, the formalities and terms to be prescribed to the Parties, the procedure to be followed, and in general to take all measures necessary for the exercise of its functions, and to settle all questions of procedure which may arise in the course of the debate.

The litigants undertake to furnish the arbiters with all the means of information at their disposal.

ARTICLE 8

Each of the Parties shall be able to appoint one or more attorneys to represent it before the arbitration tribunal.

ARTICLE 9

The tribunal is competent to decide upon the regularity of its own constitution and upon the validity and interpretation of the agreement. It is equally competent to decide disputes which may arise between the litigants as to whether questions determined by it were or were not points submitted to jurisdiction by arbitration in the written agreement.

ARTICLE 10

The tribunal shall decide in accordance with the principles of international law unless the agreement calls for the application of special rules or authorizes the arbiters to decide in the character of friendly advisers.

ARTICLE 11

A tribunal shall not be formed without the concurrence of the three arbiters. In case the minority, when duly cited, should not be willing to attend the deliberations or other proceedings, the tribunal shall be formed by the majority of the arbiters only, who shall record the voluntary and unjustified absence of the minority.

The decision of the majority of arbiters shall be considered as the award, but should the third arbiter not accept the opinion of either of the arbiters chosen by the Parties, his opinion shall have the authority of final judgment.

ARTICLE 12

The award shall decide definitively each point in litigation, and shall set forth the grounds on which it is based.

It shall be drawn up in duplicate and signed by all the arbiters. If any one of them should refuse to sign it the others shall mention that circumstance in a special protocol, and the award shall take effect whenever it is signed by the majority of the arbiters. The dissenting arbiter shall confine himself to recording his dissent when the award is signed, without stating his reasons.

ARTICLE 13

The award shall be notified to each of the Parties through the medium of its representative on the tribunal.

[947] ARTICLE 14

The award, legally pronounced, decides within the limits of its scope the controversy between the Parties.

ARTICLE 15

The tribunal shall determine in its award the period within which it shall be executed, being also competent to decide the questions which may arise with reference to its execution.

ARTICLE 16

There is no appeal against the award, and its fulfillment is confined to the honor of the nations who have signed this compact.

Nevertheless an appeal will be allowed for revision before the same tribunal which pronounced the award, provided it is lodged before the lapse of the period assigned for its execution, in the following cases:

1. If the award has been pronounced in consequence of a document having been falsified or tampered with;

2. If the award has been in whole or in part the consequence of an error of fact resulting from the arguments or documents of the case.

ARTICLE 17

Each of the Parties shall pay its own expenses and half the general expenses of the tribunal of arbitration.

ARTICLE 18

The present treaty shall remain in force ten years, dating from the exchange of ratifications. If it should not be denounced six months before the lapse of that period, it shall be considered to be renewed for another space of ten years, and so on.

The present treaty shall be ratified, and the ratification shall be exchanged in Buenos Aires within six months of its date.

In faith whereof the plenipotentiaries of the Argentine Republic and of the Republic of Bolivia have signed the present treaty in duplicate, and sealed it with their respective seals, in the city of Buenos Aires, on the 3rd day of the month of February, in the year 1902.

(Signed) AMANCIO ALCORTA.
JUAN C. CARRILLO.

TREATY OF ARBITRATION BETWEEN THE ARGENTINE REPUBLIC AND THE UNITED STATES OF BRAZIL

The Government of the Argentine Republic and the Government of the Republic of the United States of Brazil, desiring to establish upon firm, permanent bases the relations of ancient friendship and good neighborliness that [948] happily exist between the two countries, have determined to celebrate a general treaty of arbitration, and, for this end, have nominated plenipotentiaries, to wit:

His Excellency Mr. MANUEL QUINTANA, President of the Argentine Republic, Mr. MANUEL GOROSTIAGA, Envoy Extraordinary and Minister Plenipotentiary in Brazil; and

His Excellency Mr. FRANCISCO DE PAULA RODRIGUES ALVES, President of the Republic of the United States of Brazil, Mr. JOSÉ MARIA DA SILVA PARANHOS DO RIO BRANCO, Minister of State for Foreign Relations of the same Republic;

Who, duly authorized, have agreed upon the following articles:

ARTICLE 1

The high contracting Parties bind themselves to submit to arbitration the controversies that may arise between them and that they are unable to settle by direct negotiations or by any other means of amicably deciding international dis-

putes, provided such controversies do not turn upon questions involving constitutional prescriptions of the one or the other of the two countries.

ARTICLE 2

Adjusted disputes, which have been the object of definite agreements between the two Parties, shall not, by virtue of this treaty, be reopened, it being possible to submit to arbitration only the questions regarding the interpretation and execution of the same.

ARTICLE 3

The high contracting Parties shall sign a special agreement for each case that occurs.

ARTICLE 4

The points agreed upon shall be fixed with due clearness by the high contracting Parties, who should also determine the scope of the powers of the arbitrator or arbitrators and the procedure governing them.

ARTICLE 5

In the absence of special stipulations between the Parties, it shall be the duty of the arbitrator or arbitrators to designate the time of the sessions and the place, which shall be outside of the territories of the contracting States, to select the language that shall be used, shall determine the manner of presentation of the case, the formalities and periods of time to which the parties should adhere, the procedure to follow, and, in general, to take all the necessary steps to exercise their functions and solve all the difficulties that may arise in the course of the discussion.

The two Governments bind themselves to place at the disposition of the arbitrator or arbitrators all the sources of information at their disposal.

ARTICLE 6

The designation of the arbitrator or arbitrators shall be made in the special agreement or in a separate instrument, after the nominee or nominees declare that they accept the mission.

[949] ARTICLE 7

If it is agreed that the question shall be submitted to an arbitral tribunal, each of the high contracting Parties will nominate an arbitrator and they will try to agree upon a third, who will be, by right, president of the tribunal. In the case of disagreement over the election of a third, the two Governments shall request the President of the Swiss Confederation to nominate the President of the tribunal.

ARTICLE 8

Each one of the Parties may appoint one or more representatives to defend their cause before the arbitrator or arbitrators.

ARTICLE 9

The arbitrator, or the arbitral tribunal, is competent to decide as to the validity of the agreement and the interpretation of the same. Consequently, it is also competent to decide the controversies between the Parties as to whether certain questions that arise are or are not proper material to be submitted to the arbitral jurisdiction according to the terms of the agreement.

The arbitral tribunal is competent to decide as to the regularity of its own formation.

ARTICLE 10

The arbitrator or the arbitral tribunal shall be obliged to decide according to the principles of international law, following the special rules which the two parties may have established, or *ex æquo et bono,* in accordance with the powers that may have been conferred upon them by the agreement.

ARTICLE 11

The decisions of the tribunal will be taken in the presence of the three arbitrators and by unanimity or majority of votes.

The concordant votes of the two arbitrators first chosen will decide the question or questions submitted to the tribunal. If there is a difference between the two, the president, or third arbitrator, will adopt one of the votes or will give his own, which shall be decisive.

ARTICLE 12

The award must decide finally all the points in litigation, and shall be drawn up in duplicate, signed by the single arbitrator or by the three members of the arbitral tribunal. If any one of these refuses to sign, the other two shall make mention of this in a special statement signed by them.

The award shall or shall not give the reasons therefor according to the provisions of each special agreement.

ARTICLE 13

The arbitrator or the arbitral tribunal must notify the representative of each of the two Parties of the award.

[950] ARTICLE 14

The award legally pronounced decides, within the limits of its application, the litigation between the Parties. It shall indicate the time within which it must be executed.

ARTICLE 15

Each one of the contracting States binds itself faithfully to observe and carry out the arbitral award.

ARTICLE 16

The disputes that arise regarding the execution of the award will be decided by arbitration, and whenever it may be possible, by the same arbitrator who rendered it.

ARTICLE 17

If, before the termination of the execution of the award, either of the two Parties interested should have knowledge of the falsity or alteration of any document upon which the award was based, or can prove that the award was, in whole or in part, based upon an error as to fact, that party may appeal for a rehearing before the same arbitrator or tribunal.

ARTICLE 18

Each one of the Parties will pay the expenses of its representation and half of the general expenses of the arbitration.

ARTICLE 19

After the approval by the legislative power of each of the two Republics, this treaty will be ratified by the respective Governments and the ratifications will be exchanged in the city of Rio de Janeiro or in Buenos Aires in the shortest possible time.

ARTICLE 20

The present treaty shall remain in force for ten years, counting from the day upon which the ratifications are exchanged. If it should not be denounced six months before the end of this time, it will be continued for another period of ten years, and so on.

In faith whereof, we, the plenipotentiaries above named, sign the present instrument in duplicate, one in the Portuguese and the other in the Castilian language, and affix thereto our seals.

Done in the city of Rio de Janeiro, on the seventh day of the month of September, in the year nineteen hundred and five.

(Signed) MANUEL GOROSTIAGA.
[951] RIO BRANCO.

Annex 64

INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION

THE HAGUE, *October 14, 1902.*

MR. MINISTER:

The undersigned, members of the tribunal of arbitration constituted in virtue of the Treaty of Washington of May 22, 1902, between the United States of America and the United Mexican States, have the honor to address your Excellency, in your capacity as President of the Administrative Council of the Permanent Court of Arbitration, this note containing some reflections respecting the procedure to be followed before the Permanent Court of Arbitration. At the same time, the undersigned express the desire that your Excellency will kindly communicate this note to all the members of the Administrative Council with the request that they submit it to the considerate attention of their Governments.

The Convention signed at The Hague, July 29, 1899, for the pacific settlement of international disputes, presents, without any doubt, a just and reasonable basis for the procedure to be followed before an international tribunal of arbitration. The two great American States which, by virtue of the Treaty of Washington of May 22, 1902, have agreed to make the first application of the Hague Convention concerning arbitral procedure, in order to adjust their dispute

relating to the "Pious Fund of the Californias," can state that the proceedings of the tribunal of arbitration, of which we have had the honor to be the members, have been in conformity with the stipulations of that act.

The regulations for arbitral procedure elaborated by the Peace Conference have provided a solid basis and practical rules for the procedure of the tribunal of arbitration between the United States of America and the United Mexican States.

Nevertheless, desirous of contributing their little towards the progressive development of international arbitrations and of averting possible difficulties in the future execution of the regulations for arbitral procedure sanctioned by the Hague Convention, the undersigned members of the first tribunal of arbitration at The Hague, deem themselves morally obliged to submit to the considerate attention of the interested Governments some points easy of regulation in future *compromis* between litigant States. The undersigned arbitrators are imbued with the sentiment of their duty to contribute towards the better interpretation and execution of the Hague Convention for the pacific settlement of international disputes, and to secure a regular procedure in the future tribunals of arbitration constituted to reestablish harmony and peace between nations.

It is very desirable that a jurisprudence should exist in the domain of international arbitration, and it is to be hoped that every future tribunal of arbitration will add a stone to the edifice of international arbitration of which the foundations were laid by the Hague Conference of 1899.

[952] Such are the reasons for our communication.

The observations to which we take the liberty of drawing the attention of the high Governments, through the kind medium of your Excellency, are the following:

I

According to Article 22 of the Hague Convention, the International Bureau is the channel for communications relating to the meetings of the Permanent Court of Arbitration. The signatory Powers have undertaken to communicate to the International Bureau certified copies of every stipulation for arbitration arrived at between them, and of every award concerning them.

It is evident that this obligation exists especially in the cases where the Permanent Court of Arbitration must decide a difference that has arisen between signatory Powers.

However, the Hague Convention does not in any way define the *mode* of doing this in cases where the Permanent Court of Arbitration is called upon to pass judgment.

In view of this circumstance, the undersigned recommend:

That the litigant Powers that have agreed to submit their dispute to the Permanent Court of Arbitration communicate the *compromis*, immediately after its signature, to the International Bureau and ask it to take the necessary steps for the installation of the tribunal of arbitration;

That these same Powers, after the choice of arbitrators, communicate without delay the names of the latter to the International Bureau, and finally

That the International Bureau, in turn and without delay, communicate to the arbitrators appointed by the litigant Powers the *compromis* signed and the names of the members of the tribunal of arbitration already designated.

II

By virtue of Articles 32 *et seq.*, the arbitrators appointed by the litigant Powers have been obliged to choose the umpire, who, according to Article 34, is *ex officio* president of the tribunal.

These stipulations might cause inconveniences which it would be advisable to avoid.

The *third* or *fifth* member of the tribunal of arbitration chosen by his colleagues, who are appointed directly by the litigant Powers, is not always "umpire" in the technical sense of this word. He is, in the first place, the member of the tribunal of arbitration who is chosen as their colleague on account of their confidence in him.

Nevertheless, the case might occur where this member of the tribunal of arbitration, chosen by his colleagues, would categorically refuse to accept the presidency of the tribunal for reasons entirely personal but perfectly proper. This member chosen, thanks to his great reputation as a jurist and his profound learning, would be eminently useful as a member of the tribunal of arbitration. But because of his absolute refusal to preside at the meetings of the tribunal, the other members already appointed would have to renounce their choice and thus deprive the tribunal of the assistance of a very distinguished juristconsult or statesman. In consideration of these circumstances, the undersigned recommend:

That the *compromis* in the future leave to the members of the tribunal of arbitration full power to choose the president of the tribunal from among themselves, and

That the appointment of the president of the tribunal of arbitration take place at the first meeting of all the members appointed or chosen.

[953] III

Article 38 of the Hague Convention leaves to the tribunal of arbitration the choice of languages to be used by itself and to be authorized for use before it.

While recognizing the great wisdom of this stipulation, the undersigned believe it necessary to call the attention of litigant Governments to the necessity of coming to an agreement in advance concerning the languages which they desire shall be used in the discussions before the tribunal. It is absolutely necessary to make this point clear before the commencement of the work of the tribunal that the choice of agents and counsel be made with proper regard to their acquaintance with the language to be used before the arbitrators. The necessity of translating, for the use of counsel, arguments delivered before the tribunal will inevitably cause a great loss of time. In view of these observations it is desirable:

That the choice of agents and counsel before the tribunal of arbitration be made in conformity with the desire of the litigant Powers with respect to the languages to be employed before the tribunal, and

That the *compromis* in future set forth the desire or decision of the contracting Powers in this regard.

IV

Article 39 of the Hague Convention stipulates that as a general rule arbitration procedure comprises two distinct phases: *Pleadings and oral discussions.*

The pleadings consist in the communication by the respective agents to the

tribunal and to the opposite party of all printed or written acts and all documents containing the grounds relied on in the case.

This distinction between the pleadings and the oral discussions is absolutely justified and necessary. However, it can be realized only on condition that the litigant parties observe it by producing all the acts and documents *before* the commencement of the discussions. In other words: the pleadings, as a general rule, should be finished *before* the beginning of the discussions before the tribunal. Only as a rare and duly authorized exception can the tribunal still allow the production of new acts or documents in the course of the discussion, under the exceptions stated in Articles 40 *et seq.* of the Hague Convention.

In consideration of these observations, the undersigned recommend:

That the distinction between the two phases, to wit, the pleadings and the oral discussions, be observed as strictly as possible by the litigant parties;

That a longer period, if need be, be allowed by the Parties for the communication, through the intermediary of the International Bureau or directly, to the members of the tribunal and reciprocally of all acts and documents;

That the tribunal of arbitration, once assembled, shall proceed with the debates without loss of time, and

That after the close of the debates, that is to say, in the time elapsing between the close of the discussions and the moment of pronouncing the arbitral award, no communication on the part of the litigant Powers of new acts or writings be permitted.

V

The Hague Convention recognized that the litigant Powers can reserve in the *compromis* the right to demand revision of the arbitral award (Article 55). This demand must be made on the ground of the discovery "of some new fact [954] which is of a nature to exercise a decisive influence upon the award." The same tribunal of arbitration that has decided the case is also called upon to decide upon the merits of the demand for revision. Finally, the *compromis* should fix the period within which the demand for revision is admissible.

This stipulation might in practice be a source of very grave inconvenience.

If the period within which the demand for revision is admissible is very short (like that stipulated in the protocol of Washington of May 22, 1902), it would very seldom happen that a new fact giving rise to a revision would be discovered in time.

If, on the contrary, a rather long period is stipulated or if the right to demand revision at any time is granted, the obligatory force of the award will remain for a long time or forever in suspense.

This seems very undesirable.

Indeed the award will almost always occasion a feeling of discontent in one of the Parties.

If this feeling is not speedily extinguished by reason of the finality of the award, the dispute between the litigant nations might assume an acute character endangering international peace.

This is why the undersigned recommend:

That in the *compromis* the smallest possible use be made of the power accorded by Article 55 of the Hague Convention.

These, Mr. Minister, are the wishes and observations that we have the honor to submit to your high consideration, with the respectful request that they be

communicated to all the signatory Powers of the Hague Convention for the pacific settlement of international disputes.

Be pleased, Mr. Minister, to accept the assurance of our highest consideration.

(Signed) HENNING MATZEN.
EDWARD FRY.
MARTENS.
T. M. C. ASSER.
A. F. DE SAVORNIN LOHMAN.

His Excellency Baron MELVIL DE LYNDEN,
Minister of Foreign Affairs of the Netherlands,
President of the Administrative Council
of the Permanent Court of Arbitration.

Copy of the note of the Imperial Ministry for Foreign Affairs of Russia (Office of the Imperial Legation), August 22, 1903, No. 319

The Imperial Government can but render justice to the spirit of the communication, addressed October 14, 1902, to the President of the Administrative Council of the Permanent Court of Arbitration by the eminent jurists composing the arbitral tribunal charged with adjudicating the dispute relative to the Pious Fund of the Californias between the United States of America and the United Mexican States. In submitting, through the intermediation of the President, to the members of the Administrative Council certain wishes relating to the regulations on points of procedure of future arbitrations between the several States, the signers of the said communication have, as a result of their experience derived in the course of the matter confided to them, contributed valuable information that merits very particular attention.

[955] The arbitrators in the case between the United States and Mexico have asked that their recommendations be kept in mind in future *compromis* that the Powers may conclude when submitting to arbitration differences that may arise. It is in this way that a consistent jurisprudence would be established after each tribunal had "added a stone to the edifice of international arbitration, the foundations of which were laid at the Peace Conference."

The Hague Convention for the pacific settlement of international disputes moreover does not lay down, in its Article 20, the rules of procedure that it stipulates as an absolute condition for the arbitrations to be held; it allows the interested parties, by means of the *compromis* to be concluded between the States for the constitution of the arbitral tribunal, to fix upon any other method of procedure that may be deemed suitable.

In these circumstances the Imperial Government, while expressing its opinion with regard to each of the special points of the communication referred to, is naturally constrained to take into account the absolute latitude belonging to States that conclude *compromis* of this kind to make their own arrangements for the considerations that appear to them most applicable to the case.

The wish formulated under Number I relates to measures constituting a

development of Article 22 of the Hague Convention; it implies no modifications of the procedure established by that convention.

The International Bureau being the channel of communications relative to the meetings of the Permanent Court of Arbitration, it is indeed desirable that it be called upon as soon as possible to take the necessary steps for the installation of the tribunal; to this end it would be advisable that the text of the *compromis* signed by the Powers that have decided to submit an existing dispute between them to the Permanent Court be immediately sent to the International Bureau. There would also be no inconvenience in having the names of the arbitrators communicated likewise to the International Bureau, which would send them the text of the *compromis*. It goes without saying that, according to established usage and through deference to the learned jurists called upon to render the arbitral award, the Governments which have appointed them arbitrators would have themselves apprised them of such appointment.

Point II, on the contrary, implies a modification of the arbitration procedure provided by the Hague Convention. The honorable arbitrators in the case between the United States and Mexico have expressed the wish that: "the *compromis* in the future leave to the members of the tribunal of arbitration full power to choose the president of the tribunal from among themselves, and that the appointment of the president of the tribunal of arbitration take place at the first meeting of all the members appointed or chosen."

Article 34 of the Hague Convention provides that "when the tribunal does not include an umpire, it appoints its own president." This article does not, it is true, expressly say that the tribunal appoints its president from among its members; but it does not seem that it should be otherwise, according to the strict sense of Articles 32, 34, and 35 of the Convention. Article 32 provides for two cases in the constitution of the tribunal; that in which an agreement is made between the parties on the choice of arbitrators, and that where such an agreement has not taken place. In the first case the decision as to the number of the arbitrators is left to the judgment of the Parties; they may either *choose* them from the members of the Permanent Court of Arbitration, or *select* them as they like; but it is they who settle who they shall be.

In the second case, that is to say, if the tribunal has not been constituted by a direct agreement between the Parties, each of them appoints two arbitrators and it is then only that the latter choose an *umpire*, or, in the absence of agreement among them on this point, this umpire is chosen by one or more other
[956] Powers asked to put an end to such disagreement. This umpire is then *ex officio* president of the tribunal. The wish expressed in point II of the communication seems to relate only to the second case, since in the first there is no question of an umpire.

While recognizing that the technical sense of the word umpire is not exactly applicable to the nature of the functions of the fifth member of the tribunal thus chosen, it should nevertheless be borne in mind that the situation referred to would occur only when there is a divergence of views between the two Parties so marked as to necessitate recourse to a special mode of constituting the tribunal of arbitration; and this is why Article 34 has assigned this pre-eminent position to the fifth member. It would be possible, however, that for personal reasons the fifth member would not consent to accept the presidency.

Although the above-mentioned wish has a tendency to derogate from one

of the provisions of the Hague Convention, nevertheless, as the said convention is designed only to ensure every facility for the settlement of international differences, and as also future *compromis* between States can establish the rules of procedure deemed most desirable, there would be no inconvenience if these *compromis,* likewise, in the second case contemplated by Article 32, shall leave the widest latitude to the tribunal in naming its president, if the member chosen as umpire does not consent to take the presidency.

Point III concerns the choice of languages to be used by the tribunal of arbitration and to be authorized for use before it.

The signers of the communication state that Article 38 of the Hague Convention leaves to the tribunal of arbitration itself the right to choose the languages referred to, and they express the wish that the *compromis* in future will regulate this question in each case.

For the same consideration as that set forth above, that is to say, in view of the necessity of enabling the tribunals of arbitration to afford the promptest and most practical solution possible of international differences, it is indeed desirable that no difficulty arise as a consequence of the fact that one or another of the arbitrators or of the persons designated to take part in the work of the arbitration does not know the language in which the discussions are held.

When the dispute is between two States using the same language it is clear that it may not be convenient for them to adopt a third language for the arbitration procedure, although in the arbitration of 1893 between England and the United States the award was rendered in the French language. It would therefore rest with the Powers in such a case to stipulate in the *compromis* concluded by them that the language spoken by their people should be employed in the procedure, and manifestly, these Powers should also have the right to choose as arbitrators jurists acquainted with that language.

If, however, the case is one between two Powers whose peoples speak different languages, the French language, by virtue of precedents, would seem to be the most natural one to use in the arbitration procedure in the absence of an understanding to the contrary between the parties. But, as it could not be expected that all the persons that have to take part in the discussions, either for the plaintiff or defendant States, would have sufficient acquaintance with the third language adopted, we may expect that in future arbitrations the institution of sworn translators for the tribunal may become necessary, and it is this that the International Bureau would be called upon to provide for, when it has received the advance notification of the signature of the *compromis,* in view of the measures of installation to be taken, as suggested by the communication of October 14, 1902.

[957] In Point IV the jurists who have signed the above-mentioned communication ask that the production of new acts and documents during the second stage of the procedure, that is to say, during the *discussions,* be allowed only as a rare and duly-permitted exception, and even then under the reservations expressed in Articles 40 *et seq.* of the Hague Convention. According to Article 42, when the pleadings are once closed, the tribunal has *the right* to ignore during the discussions all new acts or documents that one of the Parties would like to submit to it, without the consent of the other. This article speaks only of *right* and not of *obligation,* and Article 43 further defines the discretion given in this matter to the tribunal by stipulating that the tribunal is free to take into consid-

eration these acts or documents, and to require their production on the sole condition *of communicating them to the adverse party.*

The request of the eminent jurists that the least possible use be made of the discretion lodged in the tribunal in this respect does not contemplate a modification in the procedure as established by the Hague Convention. It is a wish addressed to the members of future tribunals and, for this reason, the Imperial Government, while recognizing the value of the considerations set forth in the communication mentioned, could not lose sight of the fact that arbitration procedure should have for its object to throw as much light as possible upon the case in controversy, and that consequently it is for the tribunal itself to set the limits that it may deem necessary in the use of its rights.

With respect to Point V, concerning the revision of arbitral awards, the Imperial Government is of the opinion that it is not desirable to do away with the possibility that these awards may be revised. Like all other judicial decisions, they are always liable to error, and it may be that the production of a new fact throws more light on the matter litigated. It is the prerogative of the Governments which conclude *compromis* of arbitration to determine whether it suits them to reserve the possibility of a revision and to fix the period within which it can take place.

THE HAGUE, *February 22, 1904.*

Mr. MINISTER:

The undersigned, members of the tribunal of arbitration, constituted in virtue of the protocols of Washington of May 7, 1903, for the Venezuelan case, deem themselves morally obliged, after the final closing of this case by the delivery of the arbitral award in public session of the tribunal, February 22, 1904, to address to your Excellency this note containing some observations called forth by the course of this arbitration. Being profoundly convinced that a solid and rational jurisprudence cannot be established in the Permanent Court of Arbitration save on the basis of accumulated and duly recorded experience, the undersigned [958] have the honor to beg your Excellency kindly to communicate this note to all the members of the Administrative Council of the Permanent Court of Arbitration, who will be good enough on their part to submit it to the considerate attention of their Governments. It is desirable that future *compromis* profit by experience and take into account difficulties or inconveniences that have presented themselves in putting in practice the arbitration procedure established by the Hague Convention of July 29, 1899, and developed by *compromis* already concluded.

We concur completely in the remarks and recommendations made by our honorable predecessors, the arbitrators in the case of the "Pious Fund of the Californias," and submitted to the high Governments by the note of October 14, 1902, addressed to your Excellency.

The remarks to which we take the liberty of drawing the considerate attention of the Governments signatory to the Hague Convention of 1899, by the gracious intermediary of your Excellency, are the following:

I

The arbitrators in the case of the "Pious Fund of the Californias" have already called the attention of the Governments to the necessity that the distinc-

tion between two stages of arbitral procedure, to wit, the pleadings and the discussions, be observed as strictly as possible by the litigant Parties in order that the arbitral tribunal, when once met, can without loss of time proceed to the discussions.

The undersigned strongly support this recommendation and have the honor to add that according to their conviction the discussions before the tribunal will doubtless gain in both substance and form if a period of time must elapse between the end of the pleadings and the commencement of the arguments, whose great value for clarifying the case at issue must not be diminished. The discussions are as indispensable as the written pleadings, *i.e.*, the reciprocal exchange between the litigant Parties of the memorials, acts or documents. However, it is desirable that this exchange take place *before* the meeting of the tribunal, within the periods fixed by the Powers signing the *compromis*.

Consequently the undersigned express the wish:

That the pleadings in the case arbitrated be finished before the meeting of the tribunal competent to decide it in the order and within the periods fixed by the *compromis*, and

That interruption of the discussions by the necessity of an exchange of memorials, acts or documents, be not permitted, except in case of *force majeure* and of circumstances absolutely unforeseen.

II

The three counsel of Venezuela, in a note of September 3, 1903,[1] addressed to the members of the Administrative Council as well as to the members of the tribunal of arbitration, drew their serious attention to the inconveniences of appointing members of the Permanent Court of Arbitration as delegates or counsel before the arbitration tribunal.

The representatives of the Venezuelan Government presume that the personal relations existing between the members of the Permanent Court of Arbitration might have a certain influence on the progress and final issue of the case. The reputation of a member of the Permanent Court of Arbitration might create for him a predominating position in those cases where he is charged with representing his own Government before the tribunal of arbitration. More-
[959] over, as the member of the Permanent Court of Arbitration who would represent his government in one affair in the capacity of an agent, might in another act as an arbitrator, the fear might arise that the impartiality of the arbitrators and of the award to be pronounced would be seriously compromised, because "the gentleman who was counsel yesterday and received a favorable decision is himself a judge to-day, and the judge of yesterday is appearing as counsel before him."

Such is the reasoning of the annexed Venezuelan note against the choice by the litigant Governments of their agents, counsel or advocates from the list of members of the Permanent Court of Arbitration.

This reasoning found strong support on the part of the Government of His Britannic Majesty. Sir HENRY HOWARD, in a note of September 30, 1903,[2] addressed to the secretary general of the Permanent Court of Arbitration, categorically put the question whether members of the Permanent Court of Arbitra-

[1] See annex 1.
[2] See annex 2.

tion could be admitted as agents, counsel or advocates before the arbitration tribunal. The British Government unhesitatingly solved this question in the negative, being unable to admit that "members of the court could continually find themselves called upon to deal as judges with the interests of those who have been their clients in the not remote past, or may become their clients in the not remote future. . . ."

In virtue of his instructions the Minister of England formally protested against the appointment by the Government of the French Republic of Mr. LOUIS RENAULT, a member of the Permanent Court of Arbitration, as its agent before the arbitration tribunal constituted under the protocols of May 7, 1903, signed at Washington. The protest of the Government of Venezuela could have had in view only the same case.

The Government of the French Republic accepted neither the protests nor the reasoning of the British and Venezuelan Governments. By its note of November 3, 1903,[1] it categorically declared that the designation of Mr. RENAULT as its agent before the tribunal of arbitration "is within its rights and that no one, especially among the other attorneys, is competent to contest it." The Government of the French Republic affirmed "in all confidence that in designating Mr. LOUIS RENAULT as its agent, it not only exercised an absolute right, but in no wise deviated from the intentions expressed by those of the negotiators of the Hague Convention who wished to establish incompatibilities to a certain extent."

The undersigned arbitrators had no jurisdiction to solve this conflict of opinions. They have considered the notes hereto annexed, but they had no warrant to make a decision on this question, as neither the Hague Convention of July 29, 1899, nor the protocols of May 7, 1903, contain any prohibition against the litigant Parties making a free choice in the appointment of agents, counsel or attorneys. On the contrary, they think they should say that at the Hague Conference of 1899 Mr. HOLLS, a delegate of the United States of America, in bringing up the question of incompatibilities, himself stated his proposal in the following terms: "No member of the Permanent Court of Arbitration may, during the term of his office, accept the duties of an agent, lawyer or counsel for any Government except his own or that which has appointed him a member of the Court."[2]

[960] Finally, during the discussion of Article 8 of the Hague Convention, the partisans of a general incompatibility between the duties of a member of the Permanent Court of Arbitration and those of a special agent or attorney before this court made a special exception "for the case of a member of the court representing as attorney or special agent the country that appointed him."

In these circumstances the undersigned, after having impartially set forth the status of the question raised, confirm the unlimited right of the litigant Powers with regard to the choice of their agents, counsel or attorneys before the tribunals of arbitration formed from the Permanent Court of Arbitration of The Hague. It is only through the diplomatic channel, and as a result of a new formal agreement that this right could be limited or abolished.

Nevertheless, the undersigned express the hope,

That the Powers signatory of the Hague Convention of July 29, 1899, will

[1] See annex 3.
[2] *Proceedings* of the Conference of 1899, pt. 4, p. 795 [74], pt. 1, p. 144 [101].

take the question above dealt with into serious consideration, while bearing in mind the great difference existing between the case where the duties of agent, counsel or attorney are added to those of a member of the Permanent Court of Arbitration for the benefit of a State that has appointed him, and the other case where these duties of agent, counsel or attorney are accepted by a member of the Permanent Court for the benefit of a foreign State.

III

In virtue of Article 29 of the Hague Convention "the expenses of the International Bureau at The Hague shall be borne by the signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union." The resources which, in conformity with this article, are placed at the disposal of the International Bureau just suffice to cover the ordinary expenses of the Bureau and of its personnel. There is no reserve fund available for extraordinary expenses not foreseen in its annual budget. However, every recourse of the Powers to the Permanent Court to constitute a tribunal occasions unforeseen expenses.

Article 57 of the Hague Convention imposes upon each of the litigant Parties the payment of its own expenses and of an equal share of the expenses of the tribunal. These expenses of the arbitration are adjusted at the close of the arbitration procedure in conformity with the above article or else in execution of the award pronounced.

However, there are expenses—sometimes even very great—that are incurred both before and during the trial for which the International Bureau, which serves as registry for the arbitration tribunal under Article 22 of the Convention, has no funds at its disposal.

Thus, the question of the advisability of regularly publishing stenographic reports of the arguments came up this time with urgency, and the undersigned are of the opinion that it would have been very desirable for the discussions, both in English and in French, to have been taken down by stenographers.

Certain of the Parties had, it is true, engaged stenographers on their own account, and they have been so kind as to furnish their reports to the members of the tribunal, but these communications have necessarily been incomplete and irregular.

It is evident that this state of affairs does not comport with the dignity of the tribunal of arbitration and is not convenient for the arbitrators or even for the interested Parties themselves.

In view of these considerations the undersigned express the wish:

That, before the signature of the *compromis* by which the dispute is referred to the judgment of the tribunal of arbitration, the litigant Powers fix a certain sum which shall be immediately placed at the disposal of the International Bureau to cover expenses necessitated during the progress of the arbitration.

[961] It is evident that this sum should be included in the amount of expenses of the tribunal of arbitration of which the assessment shall be made in virtue of the *compromis* or of the Hague Convention of July 29, 1899.

Such, Mr. Minister, are the few wishes and observations that we have the honor to submit to your high consideration, with respectful request that they be communicated to all the Powers signatory to the Hague Convention for the pacific settlement of international disputes.

Be pleased, Mr. MINISTER, to accept the assurance of our very high consideration.

(Signed) N. MOURAVIEFF.
H. LAMMASCH.
MARTENS.

To his Excellency Baron MELVIL DE LYNDEN,
Minister of Foreign Affairs of the Netherlands,
President of the Administrative Council of the
Permanent Court of Arbitration at The Hague.

ANNEX 1

THE HAGUE, *September 3rd, 1903.*

To THEIR EXCELLENCIES,

The Minister of Foreign Affairs of the Netherlands, *ex-officio* President, and the Ministers of Germany, Austria-Hungary, Belgium, Denmark, Spain, United States of America, Mexico, France, Great Britain, Greece, Italy, Japan, Persia, Portugal, Roumania, Russia, Serbia, Siam, Sweden and Norway, *ex-officio* Members of the Administrative Council of the Permanent Court of Arbitration at The Hague.

GENTLEMEN: Our great anxiety to render any service in our power to the continued usefulness of the High Tribunal whose administrative business has been confided to your hands, and our conviction that such usefulness is in great danger of being inadvertently imperiled, is our excuse for addressing to you this communication. As Venezuela has no diplomatic representative at the Court of Her Majesty the Queen of the Netherlands, we are obliged to address this communication directly to you. If Venezuela were so represented we should of course address you through the usual diplomatic channel.

Your Excellencies are well aware, without any representations from us, of the very great interest taken by all the American Republics in the Court for whose successful administration you have become responsible. While the South American Republics were not invited to attend the Conference, they have acted with great promptness in availing themselves of the privilege the Powers afforded to them: and in pursuance of their uniform political history since they attained their independence they are, we feel very sure, extremely anxious that this Court should fulfill the high expectations entertained of it as a great inter-
[962] national court of arbitration and of peace. To succeed in attaining that most desirable end, we beg to submit with the greatest respect and deference to Your Excellencies that it will be necessary to preserve unimpaired the right of all independent nations, wishing to invoke the good offices of this High Court, to declare for themselves in what manner they are willing to avail themselves of such offices. It follows, therefore, that the stipulations into which they enter as between themselves and which they make obligatory as to adhering Parties, must be regarded as final and conclusive, and must consequently be duly respected.

It is not necessary that we should point out to your Excellencies how fatal

it would be to the future usefulness of this Tribunal if, after the Parties proposing to invoke its good offices have themselves defined the conditions upon which those offices are invoked, they find on arriving at The Hague that their stipulations have been disregarded. In saying this, we of course disclaim the slightest intention to impute any want of good faith to anybody, and our only desire is to guard against such misadventure as might result from an insufficient attention to the provisions of protocols submitting the cause for arbitration.

You will permit us the liberty of saying that, entertaining these views, we have been disappointed in not finding a strict observance of both the letter and the spirit of the provisions of the protocols dated May 7th, regulating the arbitration between Great Britain, Germany and Italy and Venezuela.

These protocols contain certain stipulations, without which, it is due to frankness to declare, the cause would not have been submitted to this Court.

The first of these which it is at present necessary to consider is the one offering to any creditor nation of Venezuela the privilege of joining in the arbitration. It is only necessary to read the language of the provision itself to see that no doubt whatever can arise as to the obligation of any creditor nation availing itself of that privilege to do so subject to the provisions of the protocols themselves. It seems to us the orderly procedure would have been for the Secretary General to have recorded the names of the representatives of *the Parties to the protocols,* and then have stated what other nations had adhered to the protocols in accordance with their provisions in the order of time of such adherence,—recording only the names of any representatives of any nation which had so adhered.

The other provision in the protocols, respect for which is equally indispensable, is that which declares: "The proceedings shall be carried on in the English language." There is not the slightest ambiguity about these words; but to our surprise the first step in the proceedings was the issuance of a formal notice to counsel in the French language. No doubt this was a mere inadvertence, and we have no desire to lay any stress upon it, and what followed were probably also inadvertences, but they were none the less violations of this provision of the protocols.

In requesting that respect be paid to this provision of the protocols we think we are asking what is unquestionably in the interest of the Tribunal committed to your care. The English language is prescribed in the protocols as the official language of the proceedings; and surely, therefore, it becomes the duty of the International Bureau of the Tribunal when such protocols are filed with it to respect their provisions in that regard. In saying this, we are well aware that the thirty-eighth Article of the First Convention of the Hague Conference provided: "The tribunal shall decide upon the choice of the language used by itself or to be authorized for use before it"; but that provision is a part of the third chapter on arbitral procedure, and is subject to the preceding thirtieth Article, which provides that, "with a view to encouraging the development of arbitra-
[963] tion the signatory Powers have agreed upon the following rules which shall be applicable to the arbitral procedure *unless the parties have agreed upon different regulations";* and the whole chapter on arbitral procedure is subject to the preceding twentieth Article, providing for the organization of the Court, which declares that "with the object of facilitating immediate recourse to arbitration for international differences which could not be settled by diplomatic

methods the signatory Powers undertake to organize a Permanent Court of Arbitration accessible at all times and acting, *unless otherwise stipulated by the Parties,* in accordance with the rules of procedure included in the present Convention."

It will, therefore, be seen that the Members of the Conference, in their anxiety to induce Parties to submit their disputes to this Court not only once, but twice, emphatically, and in unmistakable terms, invited the parties to such arbitration to regulate the procedure themselves.

It happened, however, that notwithstanding this anxiety on the part of the Members of the Conference, the parties to the first arbitration here did not avail themselves of their right to designate the language to be used, in their protocol, and all five of the distinguished arbitrators in that cause united in earnestly advising that all future protocols should determine the language to be used. They said, " The undersigned deem it necessary to bring the attention of the Governments in litigation to the necessity of arriving at an agreement before hand with regard to the language they may desire the discussions before the Court to take place in. It is absolutely necessary that the point be made clear prior to the commencement of the labor of the Tribunal in order that the selection of the agent and counsel may be made with a view to their knowledge of the language in which the pleadings before the arbitrators are to be made. The necessity of translating for the use of the Counsel the speeches made before the Tribunal, inevitably provokes a great loss of time. In view of these observations it is desirable:

That the choice of agent and counsel before the Arbitral Tribunal be made in conformity with the wishes of the Powers in litigation as to the language to be used before the Tribunal, and

That future compromises shall state the desire or decision of the contracting Powers in this regard."

When the present protocols were being prepared the Parties were confronted with that earnest recommendation which had the unanimous concurrence of the eminent international jurists then composing the Arbitral Tribunal, Mr. HENNING MATZEN, Sir EDWARD FRY, M. DE MARTENS, M. ASSER and M. DE SAVORNIN LOHMAN.

In conformity with that unanimous recommendation on the part of those distinguished Members of the Permanent Court, the protocols now on file with the Secretary General were framed; and the protocols clearly contemplated the appointment of arbitrators whom the counsel should address in the language that had been agreed upon by the Parties, and Venezuela was governed by this consideration in the selection of her counsel.

Your Excellencies will, therefore, appreciate that it is not in any narrow or exclusive spirit or with the desire to make the slightest technical objection that we feel constrained to invoke respect for that provision of the protocols not only as our undoubted right, but also as a condition precedent to our usefulness as counsel for Venezuela.

There is another grave matter of administration, which as friends of the Permanent Court and deeply interested in its future usefulness and success, we feel obliged to bring to your serious attention. It relates to the objections which inevitably arise to the appearance of members of the Permanent Court as
[964] counsel at its bar. Those objections seem to us so obvious as to require mere mention, and we content ourselves with alluding to only two of them.

Such persons, owing to their presumed acquaintance with other members of the Tribunal in advance of its meeting and of their presumed fitness to express weighty opinions upon questions of international law, as attested by their appointment upon the Permanent Court, might be supposed to possess certain advantages over counsel not so situated, and this conviction might lead litigants to suppose that a proper protection of their interests required them to retain some member of the Court as counsel in a given case. The second objection is even more serious,—that suspicion might attach itself to the proceedings before the Court and that a decision in favor of a member of the Court acting as counsel in one instance might exert some weight when the gentleman who was counsel yesterday and received a favorable decision is himself a judge to-day, and the judge of yesterday is appearing as counsel before him.

While we are aware that it is not within your competence to decide this question, yet having in view the unmeasured importance of the subject to the prestige and high reputation of the Court, and the growing esteem for it among all civilized nations, we feel that you will agree with us that we are perfectly justified in entering this, our solemn protest, against permitting a practice which would assuredly impair the reputation of the Permanent Court for disinterestedness and impartiality.

We beg to repeat that we proffer these suggestions to your Excellencies in absolute loyalty to the spirit which prompted His Imperial Majesty, the Emperor of Russia, to request the assembling of the Hague Conference, and with an earnest desire to contribute whatever influence we may possess to the continued growth in usefulness in the world of the principle of international arbitration.

Respectfully yours,

(Signed) WAYNE MACVEAGH.
HERBERT W. BOWEN.
WILLIAM L. PENFIELD.
Counsel for Venezuela.

ANNEX 2

THE HAGUE, *September 30, 1903.*

Mr. SECRETARY GENERAL: With reference to Your Excellency's letter of the 7th instant communicating a list of the documents received by the Inter-
[965] national Bureau of the Court of Arbitration in regard to the Tribunal instituted by virtue of the agreements signed at Washington on the 7th of May last by the representatives of Great Britain, Germany, Italy and Venezuela, I have the honor to acquaint you that the attention of His Majesty's Government has been drawn to the fact that Monsieur RENAULT who is one of the members of the Permanent Court, has been appointed to act as leading counsel for the French Government in the arbitration now before the Court.

The question whether the members of the Court should be permitted to appear as advocates before the Tribunal is, in the opinion of His Majesty's Gov-

ernment, one of great and general importance. They concur in the opinion, which has already been expressed by the leading Venezuelan Counsel, Mr. MacVeagh, in his letter to the Administrative Council of the third instant, that the practice is open to very great objection.

It appears to them of the utmost importance that the impartiality of the members of the Court, who may be called upon to act as judges, should remain beyond all possibility of suspicion, and the force of the objections to their acting as advocates is greatly increased by the fact that the number of possible litigants is limited, while the questions to be decided will constantly affect the interests of a large number or even of all these litigants. It follows that, unless precautions are taken to guard against such a contingency, members of the Court will continually find themselves called upon to deal as judges with the interests of those who have been their clients in the not remote past, or may become their clients in the not remote future.

It will be remembered that this point was discussed at the Peace Conference and that similar views were then expressed, but it was not thought advisable, at that time to lay down a rule on the subject.

In the very first case, however, which came before the Hague Tribunal, namely "the Pious Fund of the Californias," the Mexican Government appointed as their advocate one of the members of the Permanent Court, and the Government of the United States subsequently adopted a similar course in the same case.

The precedent thus created and the fact that Monsieur Renault proposes to act as counsel on the present occasion, make it in the opinion of His Majesty's Government desirable that the matter should now be reconsidered, and that formal objection to such a practice should be recorded on their part.

In accordance with the instructions of His Majesty's Government, I have therefore to make a formal protest against the appointment of a member of the Permanent Court to act as counsel in the present arbitration.

I am at the same time instructed to state explicitly that this protest is recorded on purely general grounds, and that His Majesty's Government entertain the most implicit belief and confidence in Monsieur Renault's personal fairness and impartiality, which indeed permits them with less hesitation to call attention to the matter at the present time.

I need hardly add how fully I desire to associate myself with the sentiments expressed by my Government in this regard.

While asking you to be kind enough to bring this communication to the knowledge of the Administrative Council and also of the Tribunal at the earliest opportunity, I avail myself of this opportunity to renew to your Excellency the assurance of my highest consideration.

(Signed) Henry Howard.

His Excellency Mr. Ruyssenaers,
Secretary General of the Permanent Court of Arbitration.

[966]

ANNEX 3

THE HAGUE, *November 3, 1903.*

Mr. SECRETARY GENERAL: I did not fail to submit to my Government the letter which was addressed, on September 30th last, to your Excellency by Sir HENRY HOWARD, to be communicated to the members of the Administrative Council of the Permanent Court as well as to the members of the arbitral tribunal at present in session at The Hague. In this letter the minister of Great Britain declares that, in pursuance of instructions from his Government, he protests against the appointment of a member of the Court of Arbitration to act as counsel in the present arbitration.

This protest has appeared to the Government of the Republic to warrant immediately express reservations on its part.

After a careful examination of the question, the Government of the Republic appointed Mr. LOUIS RENAULT to represent it before the tribunal entrusted with the settlement of the dispute which has arisen in connection with the claims against Venezuela. It considered, and still considers that this appointment is within its rights, and that no one, especially among the other attorneys, is competent to contest it.

According to Article 37 of the Convention of July 29, 1899, "the parties are entitled to appoint delegates or special agents to attend the tribunal to act as intermediaries between themselves and the tribunal. They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose."

This text leaves to the parties the fullest liberty regarding the choice of delegates or special agents, counsel or attorneys. It establishes no incompatibility, and, consequently, there is reason to ask by what right one party would be justified in making observations on the manner in which another party has provided for the representation of its interests.

It is proper to observe also that a question of incompatibility had been raised during the discussions preliminary to the convention of 1899, and it is not unimportant to know the views which were expressed on this subject.

According to the report made by Chevalier DESCAMPS on behalf of the committee of examination, "Sir JOHN PAUNCEFOTE, Mr. LAMMASCH, and Mr. HOLLS were of the opinion that it was important to establish the duties of a member of the Permanent Court of Arbitration as generally inconsistent with those of special agent or attorney before this Court, *making an exception only in the case where a member of the court might represent as attorney or special agent the country which appointed him to the Court.*"[1] Thus the members of the committee of examination who went the furthest in the direction of incompatibility, and among whom was the first delegate of Great Britain, made an exception for the case in which a member of the Court was representing the country which had appointed him, which is the case of Mr. LOUIS RENAULT.

In the case of the "Pious Fund of the Californias," which was adjudicated last year at The Hague, the two Parties, the United States and Mexico, employed as counsel two members of the Court of Arbitration, Messrs. BEERNAERT and DESCAMPS, *who were not their nationals.* No observation was made on the subject.

[967] The report of Mr. DESCAMPS also indicates the opinion of the committee of

[1] *Proceedings* of the Conference of 1899, pt. 1, p. 144 [101].

examination on this same question of incompatibility: "The Committee to which the examination of this same question was referred, expressed the opinion that no member of the Court can, during the exercise of his functions as a member of an arbitral tribunal, accept a designation as special agent or attorney before another arbitral tribunal." The committee, therefore, supposed two tribunals to be operating simultaneously, and it thought that a jurisconsult who was acting as judge in one of them ought not at the same time to act as agent or attorney before the other. However, this is not the case in the present instance, and, besides, this opinion was not sanctioned by the conference, since the convention contains no provision relating to incompatibilities.

The Government of the Republic can therefore affirm in all confidence that, in designating Mr. Louis Renault as its agent, it not only exercised an absolute right, but in no wise deviated from the intentions expressed by those of the negotiators of the convention who wished to establish incompatibilities to a certain extent.

It would seem to appear from the letter of the British Legation at The Hague that, in the opinion of the English Government, it would be desirable that the question thus raised should be re-examined, that is to say, doubtless, submitted eventually to the consideration of the Powers which signed the Convention of 1899.

This is an acknowledgment that, in order to have the views of the British Government adopted, a revision of the Convention would be necessary. The Government of the Republic, considering on its part, that the question under discussion cannot be raised except for the future and through diplomatic channels, deems it necessary to formulate to-day expressly the present reservations regarding the communication addressed September 30th last by the British Legation to the secretary general of the Permanent Court of Arbitration.

Requesting you to bring this letter to the knowledge of the Administrative Council and the Tribunal, I embrace this opportunity to renew to your Excellency the assurances of my highest consideration.

(Signed) Ségur d'Aguesseau.

His Excellency Mr. Ruyssenaers,
Secretary General of the Permanent Court of Arbitration.

Copy of the Note of the Imperial Ministry for Foreign Affairs of Russia of June 8, 1905, No. 269, from the Imperial Legation

The memorandum of February 22, 1904, presented to his Excellency Baron Melvil de Lynden, President of the Administrative Council of the Permanent Court of Arbitration by Messrs. Mouravieff, Lammasch, and Martens, members of the tribunal of arbitration in the Venezuela case, to be communicated to the governments of the States signatory of the Convention of July 17/29, 1899, relative to the pacific settlement of international disputes has not failed to engage the most careful attention of the Imperial Government.

As regards the recommendation expressed in the said memorandum in con-

firmation and development of recommendation previously set forth by the arbitrators in the case of the Pious Fund of the Californias, to wit, that the pleadings in cases submitted to the Court be concluded in the order and within
[968] the periods fixed by the *compromis* in advance of the meetings of the tribunal competent to pass judgment thereon, and that interruption of the discussions through the necessity of exchanging memorials, acts or documents be not allowed except in case of *force majeure* and of absolutely unforeseen circumstances, the Imperial Government can only give its assent to the opinion expressed by those eminent arbitrators. It is indeed desirable that the distinction between the two stages of arbitral procedure, the pleadings and the discussions, be observed as exactly as possible and with this end in view a sufficient period of time elapse between the close of the proceedings and the beginning of the arguments.

With respect to the question whether members of the Permanent Court of Arbitration may be appointed delegates or counsel before an arbitral tribunal, the Imperial Government considers the second wish expressed by Messrs. Mouravieff, Lammasch, and Martens to be well grounded and likewise declares that the right of the litigant Powers with respect to the choice of their agents, counsel or attorneys, before the said tribunals has not been limited by any conventional stipulation, but that it is proper to take into account the great difference existing between the case where these functions are in addition to that of member of the Permanent Court for the benefit of the State that has appointed these agents, counsel or attorneys, and the other case where the said functions would be accepted by a member of the Court for the advantage of a foreign State.

With regard to the third wish set forth in the memorandum under consideration, which deals with the fixing of a certain sum to be placed at the disposal of the International Bureau by the litigant Powers to defray expenses necessitated in the course of the arbitration, it is proper to remember that Article 57 of the Convention of July 17/29, 1899, stipulates that each party pays its own expenses and an equal share of the expenses of the tribunal. There would, therefore, be no inconvenience in some of the expenses of this latter category being defrayed in advance by a sum placed at the disposal of the International Bureau, especially if it were deemed necessary to add stenographers to the personnel of the secretary's office. It seems, nevertheless, that the amount of the said sum should not be stipulated in the *compromis* concluded between the parties relative to the constitution of a tribunal of arbitration and that it would be only agreed that the amount would be permitted after the International Bureau had notified the litigant States of its estimate of the expenses.

The experience acquired in the course of recent years has shown that the organization provided by the Hague Convention for giving every desirable advantage to the drawing up of the minutes of the discussions before the Court is in need of certain improvements. According as recourse to arbitration becomes developed among civilized States as an institution eminently effective for the pacific settlement of international disputes, the difficulties in drawing up the minutes of the proceedings as well as in the choice of the language in which the discussions may be held will not fail to claim attention. The secretary general has very important functions as the head of the registry of the Court, and the obligations thereby incumbent upon him are so absorbing that he should not also be charged with tasks that he would not also be in a position to perform fully.

It should not be expected of the personnel of the secretary's office, as it is at present constituted under the regulations concerning the organization of the internal administration of the International Bureau, that they have a working knowledge of all the languages that are permitted in the discussions, nor should they be asked to do the large amount of work that the drawing up of the detailed minutes might necessitate. This is why it seems proper to consider immediately putting at the disposal of States that may in the future address the International Court of Arbitration for the solution of their differences a more complete organization that would answer all needs and would allow future tribunals to have experienced secretaries thoroughly acquainted with the different languages, as well as sworn translators.

[969] The wise and eminent jurists who met at the Hague Conference desired that the functions of members of the Court be assigned to persons continuing to reside in their own countries who would not have to betake themselves to The Hague except when they are called to sit on the Court. It seems that similarly a certain number of secretaries and sworn translators might be connected with the Court who would belong to different nationalities and not ordinarily reside at The Hague, but would betake themselves thither when called upon to form part of the secretary's office of a tribunal of arbitration.

Article 28 of the Convention of July 17/29, 1899, specifying that the Administrative Council has "entire control over the appointment of officials and employees of the Bureau," the said council can draw up a list of these secretaries, at least at the beginning for the principal languages employed, which secretaries would be chosen among the persons who have already shown their competence in drawing up minutes in cases of the kind to which the disputes submitted to the Court may belong.

It is from this list that the president of the tribunal, who in virtue of the Hague Convention (Article 41) appoints the secretaries charged with drafting the proceedings, may, in agreement with the International Bureau, make, with regard to the number and the persons, a choice adapted to the particular conditions of the arbitration, and to the language to be employed in the discussions. The honoraria for the secretaries in question as well as their expenses in transit and, if it be deemed necessary, the expenditures attendant upon the addition of stenographers and sworn translators could be covered by the sum that the litigant States had placed at the disposal of the International Bureau. It would be for the latter to submit in advance to the States whose difference is to be brought before the Court its estimates of the amount of money necessary and to come to an agreement with the president of the tribunal regarding the steps to be taken. Article 28 of the Convention of July 17/29, 1899, also stipulates that the Administrative Council, which has the International Bureau under its direction and control, fix the payments and salaries and control the general expenditure.

In suggesting this plan, which has for its object to develop and give regularity to the existing practice, in virtue of which the secretariat of the Court has had to be completed in previous arbitrations by persons not belonging to the International Bureau, the Imperial Government does not intend to insist particularly upon the adoption of the method set forth above. As it has in view only to ensure the good working of the International Court and as it thinks that all previous experience should be profited by, it is ready to accept any plan that may be deemed better.

The Imperial Government believes that it is highly desirable that the Administrative Council be called upon immediately to consider this question, in view of the cases of arbitration, perhaps very numerous, that may result from the conventions recently concluded by several States relative to recourse to this method of judicial settlement. The Administrative Council might proceed to this examination by expressing itself upon the subject of the recommendations set out by Messrs. MOURAVIEFF, LAMMASCH, and MARTENS, and also with regard to the recommendations expressed by the arbitrators in the case of the Pious Fund of the Californias, with relation to which the Imperial Government has on its part already stated its opinion. It would be for the Administrative Council, if these considerations were adopted, to complete in the sense above indicated the provisions of the regulations concerning the organization of the internal working of the International Bureau as well as the regulations of the Council.

[970]

Annex 65

COLLECTION OF GENERAL ARBITRATION TREATIES CONCLUDED BY THE REPUBLIC OF URUGUAY

Treaty of arbitration concluded between the Oriental Republic of Uruguay and the Kingdom of Spain

I, JUAN L. CUESTAS, President of the Oriental Republic of Uruguay, make proclamation:

That on the 28th day of January, 1902, there was concluded and signed by our Ambassador and that of His Majesty the King of Spain a treaty of arbitration, which is word for word as follows:

The Envoy Extraordinary and Minister Plenipotentiary of Uruguay, and the Envoy Extraordinary and Minister Plenipotentiary of His Catholic Majesty to the United States of Mexico, being duly authorized by their respective Governments to conclude a treaty of arbitration with a view to the peaceful solution by both States of any question which may disturb the friendly relations which happily exist between both nations, have agreed upon the following articles:

ARTICLE 1

The high contracting Parties engage themselves to submit to arbitration all controversies of whatever nature which may from any cause whatsoever arise between them, provided that they do not affect the constitutional principles of either State, and provided always that they cannot be settled by direct negotiations.

ARTICLE 2

Any questions which may have been made the object of definite agreements between the two contracting Parties cannot be again brought up in virtue of this Convention.

In such cases the arbitration shall be limited exclusively to the questions which may be raised on the validity, interpretation, and fulfillment of the said agreements.

ARTICLE 3

With a view to the decision of the questions which, in fulfillment of this Convention, shall be submitted to arbitration, the duties of arbitrator shall be entrusted by preference to the head of the State of one of the Spanish-American Republics or to a tribunal composed of judges and experts of Spanish, Uruguayan, or Spanish-American nationality.

In the event of it being found impossible to reach an agreement in regard to the appointment of the arbitrators, the high contracting Parties shall apply to the Permanent International Tribunal of Arbitration, established in conformity with the Convention of the Conference of The Hague in 1899, submitting themselves in the latter and in the former case to the arbitral procedure specified in Chapter 3 of the aforesaid Convention.

ARTICLE 4

The present Convention shall remain in force during ten years, to be counted from the date of the exchange of its ratifications.

[971] In the event of neither of the high contracting Parties having declared it to be their intention, twelve months before the expiration of the aforesaid period, to terminate the effects of the present Convention, it shall continue in force until a year after one or the other of the high contracting Parties shall have denounced it.

ARTICLE 5

This Convention shall be submitted by the undersigned for the approval of their respective Governments, and if it obtains their approval, and if it be ratified according to the laws of each State, the ratifications shall be exchanged in the town of Montevideo, within the period of one year to be counted from the date of this document.

In faith of which the plenipotentiaries have signed and affixed their seals on the 28th day of the month of January, 1902.

(Signed) JUAN CUESTAS.
MARQUIS DE PRAT DE NANTOUILLET.

[971]

General treaty of arbitration concluded between the Oriental Republic of Uruguay and the Argentine Republic

ADDITIONAL PROTOCOL

I, JUAN L. CUESTAS, President of the Oriental Republic of Uruguay, make proclamation:

That on the eighth day of the month of June in the year 1899, in the city of Buenos Aires, there was concluded and signed by our Ambassador and that

of the Argentine Republic, who were provided with full powers, a general treaty of arbitration between the two countries, which is word for word as follows:

The Governments of the Oriental Republic of Uruguay and of the Argentine Republic, being animated by the common desire to arrange by amicable means any question which may arise between the two countries, have resolved to draw up a general Treaty of Arbitration, for which purpose they nominate as their plenipotentiaries, to wit:

His Excellency the President of the Republic of Uruguay, his Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic, Dr. Don GONZALO RAMIREZ; and

His Excellency the President of the Argentine Republic, his Minister in the Department of Foreign Affairs and Religion, Dr. Don AMANCIO ALCORTA;

Who, having communicated their full powers, which were found to be in good and due form, agreed upon the following Articles:

ARTICLE 1

The High Contracting Parties undertake to submit to decision by arbitration all controversies of whatever nature which for any cause whatsoever may
[972] arise between them, in so far as they do not affect the principles of the Constitution of either country, and provided always that they cannot be settled by means of direct negotiations.

ARTICLE 2

Questions which may have been the object of definitive agreements between the contracting Parties cannot be reopened by virtue of this Treaty.

In such cases arbitration shall be limited exclusively to the questions which may arise respecting the validity, interpretation and fulfillment of such agreements.

ARTICLE 3

In every case which occurs the Arbitration Tribunal shall be constituted to decide the controversy raised.

If there should be disagreement respecting the constitution of the Tribunal the latter shall be composed of three Judges. Each State shall name an arbiter, and these shall designate the third.

If they should be unable to agree upon that designation, it shall be made by the Chief of a third State who shall be indicated by the arbiters named by the Parties.

Should they be unable to agree as to this latter nomination the President of the French Republic shall be invited to designate him.

The arbiter thus selected shall be of right President of the Tribunal.

A person cannot be named as third arbiter who has already given a decision in that capacity in a case of arbitration under this Treaty.

ARTICLE 4

No one of the arbiters shall be a citizen of the contracting States or domiciled in their territory. Neither shall he have an interest in the questions submitted to arbitration.

ARTICLE 5

In case of one or more of the arbiters declining, withdrawing or being otherwise prevented from acting, substitutes shall be found in the same manner as that adopted for their nomination.

ARTICLE 6

The points at issue shall be indicated by the contracting States who shall also be able to determine the scope of the arbiters' powers and any other circumstance relating to the procedure.

ARTICLE 7

In default of special stipulations between the Parties, it shall be incumbent on the Tribunal to fix the time and place of its sessions outside the territory of the contracting States, to select the language to be employed, to determine the methods of proof, the formalities and terms to be prescribed to the Parties, the procedure to be followed, and, in general, to take all measures necessary for the exercise of its functions and to settle all the difficulties of procedure which might arise in the course of the debate. The litigants undertake to furnish the arbiters with all the means of information at their disposal.

[973] ARTICLE 8

Each of the Parties may appoint one or more mandatories to represent it on the Arbitration Tribunal.

ARTICLE 9

The Tribunal is competent to decide upon the regularity of its own constitution, and upon the validity and interpretation of the agreement.

It is equally competent to decide disputes which may arise between the litigants as to whether questions determined by it were or were not points submitted to jurisdiction by arbitration in the written agreement.

ARTICLE 10

The Tribunal shall decide in accordance with the principles of international law unless the agreement calls for the application of special rules or authorizes the arbiters to decide in the character of friendly advisers.

ARTICLE 11

A Tribunal shall not be formed without the concurrence of the three arbiters. In case the minority, when duly cited, should not be willing to attend the deliberations or other proceedings, the Tribunal shall be formed by the majority of the arbiters only who shall record the voluntary and unjustified absence of the minority.

The decision of the majority of the arbiters shall be accepted as the sentence, but if the third arbiter does not accept the opinion of either of the arbiters named by the Parties, his decision shall be final.

ARTICLE 12

The sentence shall decide definitely each point in litigation, and shall set forth the grounds upon which it is based.

It shall be drawn up in duplicate and signed by all the arbiters. If any one of them should refuse to sign it, the others shall mention that circumstance in a special protocol, and the sentence shall take effect whenever it is signed by the majority of the arbiters. The dissenting arbiter shall confine himself to recording his dissent when the sentence is signed without stating his reasons.

ARTICLE 13

The sentence shall be notified to each of the Parties through the medium of its representative on the Tribunal.

ARTICLE 14

The sentence legally pronounced decides within the terms of reference the controversy between the Parties.

ARTICLE 15

The Tribunal shall determine in its sentence the period within which it shall be executed, being also competent to decide the questions which may arise with reference to its execution.

ARTICLE 16

There is no appeal against the sentence, and its fulfillment is confided to the honor of the nations who have signed this compact.

[974] Nevertheless, an appeal will be allowed for revision before the same Tribunal which pronounced it, provided it is lodged before the lapse of the period assigned for the execution, in the following cases:

1. If sentence has been pronounced in consequence of a document having been falsified or tampered with.

2. If the sentence has been in whole or in part the consequence of an error of fact resulting from the arguments or documents of the case.

ARTICLE 17

Each of the Parties shall pay its own expenses and half of the general expenses of the Tribunal of Arbitration.

ARTICLE 18

The present Treaty shall remain in force ten years, dating from the exchange of ratifications.

If it should not be denounced six months before the lapse of that period, it shall be considered to be renewed for another space of ten years, and so on.

The present Treaty shall be ratified, and the ratifications shall be exchanged in Buenos Aires within six months of its date.

In virtue of which the plenipotentiaries of the Republic of Uruguay and of the Argentine Republic have signed the present Treaty in duplicate and sealed it with their respective seals in the city of Buenos Aires, on the 8th day of June, 1899.

(L.S.) GONZALO RAMIREZ.
(L.S.) AMANCIO ALCORTA.

Treaty of Peace and Recognition of Debt concluded between the Governments of the Oriental Republic of Uruguay and the Republic of Paraguay.

I, MAXIME SANTOS, Brigadier General and President of the Oriental Republic of Uruguay, make proclamation:

That on the 20th day of the month of April of the year 1883 in the city of Asuncion, there was concluded and signed by our Ambassador and that of the Republic of Paraguay, who were provided with full powers, a treaty of peace, friendship and recognition of debt, which is word for word as follows:

The Oriental Republic of the Uruguay and the Republic of Paraguay being desirous of cementing in a formal manner, and in clear and precise terms, the ties of peace, friendship and union, which were reestablished between both nations by the termination of hostilities, and by the stipulations of the preliminary agreement of the 20th of June, 1870, have resolved to conclude a definitive treaty of peace and friendship, and for the recognition of debt, and have named as their plenipotentiaries, to wit:

His Excellency the President of the Oriental Republic of Uruguay, his Excellency Don ENRIQUE KUBLY, his Envoy Extraordinary on special mission to Paraguay.

His Excellency the President of the Republic of Paraguay, Don JOSÉ SEGUNDO DECOUD, his Secretary of State in the Department of Foreign Affairs;

[975] who, having communicated to each other their respective full powers, found to be in good and due form, have agreed to the following articles:

ARTICLE 1

There shall be perpetual peace and amity between the Oriental Republic of Uruguay and the Republic of Paraguay.

ARTICLE 2

The Republic of Paraguay recognizes as a debt on its part:

1. The sum of 3,690,000 dollars as the amount of expenses incurred by the Oriental Republic of Uruguay for the Paraguayan campaign of 1865.

2. The amount of damages and losses occasioned by the war to citizens and other persons under the protection of the laws of the Oriental Republic of Uruguay.

ARTICLE 3

The Oriental Republic of the Uruguay, deferring to the wish expressed by the Government of Paraguay, and desiring to afford to that Republic a proof of friendly sympathy as well as of its devotion to South American Confraternity, hereby declares that it formally renounces its claim to the recovery of the war expenses which are referred to in the first paragraph of the preceding article, with the special exception of the amount of the claims which are mentioned in the second paragraph of the same article.

ARTICLE 4

The examination and adjustment of the claims referred to in the second paragraph of Article 2, shall be conducted in the manner and form prescribed by the internal legislation and rules of procedure of the Republic of Paraguay.

ARTICLE 5

The term of 18 months is fixed for the presentation of the claims alluded to in the preceding article.

ARTICLE 6

The debt arising out of the aforesaid claims shall be dealt with and liquidated by the Paraguayan Government on the same footing as the payment which may be made to Brazil and the Argentine Republic.

ARTICLE 7

All the navigable rivers of the Republic of Paraguay remain open to the lawful commerce of Oriental vessels, and reciprocally all the navigable rivers of the Oriental Republic of Uruguay remain open to the lawful commerce of Paraguayan vessels.

[976] ARTICLE 8

If, notwithstanding the feelings which now animate the Government of the Republic of Paraguay and that of the Oriental Republic of the Uruguay, and which tend to preserve and to draw closer the friendly relations fortunately existing between both of them, serious questions should arise of a nature to compromise those relations which are the chief aim of the present treaty, both the high contracting Parties bind themselves, before resorting to extreme measures, to submit such questions to the arbitration of one or more friendly Powers.

ARTICLE 9

The present treaty shall be ratified, and the ratifications shall be exchanged in the city of Montevideo within the shortest time possible.

In witness whereof, we, the plenipotentiaries of the Governments of the Oriental Republic of Uruguay and of the Republic of Paraguay, have signed the present treaty and have affixed thereto our seals.

Done in duplicate in the city of Asuncion del Paraguay, on the 20th day of the month of April, in the year 1883.

(Signed) ENRIQUE KUBLY.
JOSÉ S. DECOUD.

Annex 66

TREATIES AND CONVENTIONS CONCLUDED BY ITALY IN THE MATTER OF ARBITRATION SINCE THE YEAR 1899 [1]

I.—GENERAL ARBITRATION CONVENTIONS

1. Italy and France: December 25, 1903.
2. Italy and Great Britain: February 1, 1904.

[1] For the period preceding, see the note inserted in annex E to the report on the Convention for the pacific settlement of international disputes.

3. Italy and Switzerland: November 23, 1904.
4. Italy and the United States of America: December 24, 1904 (this convention has not been ratified).
5. Italy and Portugal: May 11, 1905.

All these conventions are drawn up in identical form (see below, **A**, the text of the convention with France).

6. Italy and Peru: April 18, 1905.
7. Italy and Denmark: December 16, 1905.

The text of these two conventions (see below, **B** and **C**) differ essentially from that of the preceding conventions.

[977] II.—Arbitration Clauses

1. Italy and Mexico.—Extradition treaty of May 22, 1899, Article 20.
2. Italy and Cuba.—Treaty of friendship, commerce and navigation of December 29, 1903, Article 27.
3. Italy and Nicaragua.—Treaty of friendship, commerce and navigation of January 25, 1906, Article 26.
4. Italy and Salvador.—Treaty of friendship, commerce and navigation of April 14, 1906, Article 26.

The clause inserted in these acts is drawn up in almost identical form (see below, **D** [a]).

5. Italy and Switzerland.—Treaty of commerce of July 13, 1904, Article 18 and additional provision, additional Article 18.

(See below, **D** [b].)

6. Italy and Germany.—Treaty of December 3, 1904, additional to the Treaty of commerce, customs and navigation of December 6, 1891: Article 1, IV (Article 14 *a*) and Article 2, II (additional Article 14 *a* of the Treaty).
7. Italy and Austria-Hungary.—Treaty of commerce and navigation of February 11, 1906: Article 15 and Final Protocol, additional Article 15.

The clauses inserted, in almost identical terms, in these two treaties (see below, **D** [c]) differ in some points from those in No. 5.

8. Italy and Austria-Hungary.—Convention on epizooty of February 11, 1906: Final Protocol, paragraph 2.

This clause concerns the appointment of "Mixed Commissions" (see below **D** [d]).

9. Italy and Bulgaria.—Treaty of commerce, customs and navigation of January 13, 1906: Article 20 and Final Protocol, additional Article 20.
10. Italy and Roumania.—Treaty of commerce, customs and navigation of December 5, 1906: Article 18 and Final Protocol, additional Article 18.
11. Italy and Serbia.—Treaty of commerce and navigation of January 14, 1907: Article 14 and Final Protocol 1, additional Article 14.

The clause inserted in identical terms in these treaties (see below, **D** [e]) is more extensive than the others, in the sense that it refers also to "all questions concerning the exercise of commerce between the two countries." Like the treaty with Switzerland, these treaties submit to arbitration even "the preliminary question as to whether the dispute is of a nature to be referred to the arbitral tribunal."

III.—Special Conventions

1. Italy and Peru.—Protocol of November 25, 1899, concerning the claims of Italian *ressortissants* residing in Peru on account of damages suffered during the civil war of 1894-95.

The protocol concerns the appointment of the arbitrator, the determination of the object of the litigation, the rules of law to be applied, and many regulations of procedure.

[978] 2. Italy and Venezuela.—Protocol of February 13, 1903, Articles 4, 5, and 6, and Arrangement of May 7 of the same year concerning the claims of Italian *ressortissants* for damages suffered during the revolution.

The two Acts concern the nomination of a mixed commission, and, in case of necessity, of an arbitrator, the determination of the subject of the litigation, the rules of law to be applied and several provisions for procedure.

3. Italy.—Some *compromis* have been concluded by Italy, especially with Peru (prior to the general convention of April 18, 1905), to submit to arbitration the differences arising as to the interpretation of certain articles of the treaty of commerce and of the consular convention in force between the two States, and with Guatemala concerning the claims of an Italian subject against the Government of the Republic.

A

(See No. 1, 1-5 of the above note)

General treaty of arbitration between Italy and France

The Government of His Majesty the King of Italy and the Government of the French Republic, signatories of the Convention for the pacific settlement of international disputes, concluded at The Hague, July 29, 1899;

Considering that by Article 19 of that Convention the high contracting Parties have reserved to themselves the right to conclude agreements for the purpose of recourse to arbitration in all cases which they may consider it possible to submit thereto;

Have authorized the undersigned to conclude the following provisions:

Article 1

Differences of a juridical nature or relating to the interpretation of treaties existing between the two contracting Parties which may arise between them and which it may not be possible to settle by diplomatic means, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, upon condition, however, that they affect neither the vital interests, independence, nor honor of the contracting States, and that they do not relate to the interests of third Powers.

Article 2

In each particular case the high contracting Parties, before appealing to the Permanent Court of Arbitration, shall sign a special *compromis* setting forth clearly the object of the litigation, the extent of the Powers of the arbitrators and the delays to be observed in all that concerns the constitution of the arbitral tribunal and the procedure.

ARTICLE 3

The present agreement is concluded for a period of five years, dated from the day of signature.

[979] Done at Paris, in duplicate, December 25, 1903.

B

(See No. 1, 6 of the above note)

General treaty of arbitration between Italy and Peru

His Majesty the King of Italy and his Excellency the President of the Republic of Peru, animated by the desire to strengthen and increase the cordial relations existing between their respective countries, and to settle amicably all differences that might arise between them, have resolved to conclude a general arbitration treaty, and to that end have named as their plenipotentiaries: . . .

Who, having found their respective powers in good and due form, have agreed upon the following:

ARTICLE 1

The high contracting Parties obligate themselves to submit to arbitration all disputes, of whatever nature, that for any reason whatever may arise between them and that may not have been settled amicably through direct negotiations. From the arbitration *compromis* are alone excepted questions that concern national independence and national honor. In case there should be doubt regarding these two matters, the question shall also be settled by arbitral decision.

In particular are not considered as involving national independence and national honor, disputes concerning diplomatic privileges, consular jurisdiction, rights regarding customs, navigation, validity, interpretation and execution of treaties; pecuniary claims of whatever nature and whatever their precedents, it being understood that it is the intention of the two Governments to give the widest possible scope to the application between them of the principle of international arbitration.

The present treaty shall also apply to disputes arising from facts anterior to its conclusion: but questions that have already been the object of definitive settlements between the two Parties may not be reopened, and, in so far as they are concerned, arbitration shall bear only upon the difficulties that may have arisen in regard to the interpretation and execution of said settlements.

ARTICLE 2

For each such dispute that may arise, the high contracting Parties shall by mutual agreement appoint the arbitrator who is to settle the case. If they cannot reach an agreement with regard to this designation, the arbitrator shall be appointed by the chief of a third Power to whom the two countries shall forward a request to that effect. If they cannot agree with regard to making this designation, Italy will demand, at its choice, to direct such request to His Majesty the King of Belgium, to His Majesty the King of Denmark, or to His Majesty the King of Sweden and Norway: and Peru, to his Excellency the President of the United States of America, to his Excellency the President of

the Argentine Republic, or to His Majesty the King of Spain. Each of the high contracting Parties shall exercise the right alternatively, in accordance with the order of the cases, and the other Party shall be entitled to exclude one of the chiefs of States who may be requested to make this appointment.

But if the high contracting Party whose privilege it shall be, in accordance with the order established in the present article, to exercise the right of requesting the chief of one of the above-mentioned States to make the nomination of the arbitrator, does not do so within four months of the invitation formulated in writing by the other contracting country, this latter country shall then have the right to forward the request for the appointment of the arbitrator to one of the chiefs of State which it is entitled to designate in accordance with the present article.

[980] ARTICLE 3

The arbitrator shall neither be a citizen of the contracting Parties, nor be domiciled in their countries, nor have a direct or indirect interest in the questions to be settled by such arbitration.

ARTICLE 4

Whenever, for any reason whatever, the arbitrator shall not accept the charge to which he has been appointed, or shall not be able to continue to perform such charge, he shall be replaced by observing the same procedure as that followed for his appointment.

ARTICLE 5

In each case, the high contracting Parties shall conclude a special convention in order to determine the exact object of the dispute, the scope of the powers of the arbitrator appointed in accordance with the preceding articles, and the other matters and circumstances of whatever nature relating to the arbitration.

For lack of this convention, and after certification by one of the high Parties that four months have elapsed since the invitation was addressed to the other Party to conclude it, and the said convention could not be concluded for any reason whatever, it shall be incumbent upon the arbitrator to fix upon the basis of the mutual claims of the Parties, the matters of fact and of law, that must be settled in order to take definitive action upon the dispute.

For lack of a special convention or in case of silence upon this matter in this convention, the hereinafter following rules shall apply for all other determination.

ARTICLE 6

In the absence of special agreements between the Parties it is incumbent upon the arbitrator to designate the date and the place of its meetings, but the meetings shall not be held within the territory of either of the contracting Parties; to determine the forms of procedure and of hearings, the formalities and delays that shall be imposed upon the Parties; and in general to take all necessary measures with regard to the exercise of his functions, and to settle all matters and all difficulties of procedure, and all preliminary questions that might arise.

The Parties obligate themselves to place all means of information at their command at the disposal of the arbitrator.

ARTICLE 7

The arbitrator shall have the right to take definitive action with regard to his own jurisdiction and with regard to the validity of the *compromis* and its interpretation.

ARTICLE 8

A mandatory of each of the contracting Parties shall represent his Government in all matters connected with the arbitration.

[981]

ARTICLE 9

The arbitrator shall decide in accordance with the principles of law, unless the *compromis* imposes upon him the obligation of following special rules or authorizes him to decide as friendly compositor.

ARTICLE 10

The decision shall be definitive upon each matter in litigation.

It shall be reported in duplicate, signed by the arbitrator and notified to each of the Parties directly or through the medium of their representative before the arbitrator.

ARTICLE 11

Each of the Parties shall meet its own individual expenses and one-half of the general arbitration expenses.

ARTICLE 12

Within the limits in which it decides, the award legally rendered settles the litigation between the Parties. It shall contain the indication of the period within which it must be executed. The same arbitrator who shall have rendered the decision shall settle the difficulties that may arise regarding the execution of this decision.

ARTICLE 13

The decision shall not be appealable and its execution shall be left to the honor of the signatory nations of the present arrangement.

Nevertheless, the revision of the decision shall be receivable before the same arbitrator who has rendered it, whenever such action shall have been taken before the said decision may have been executed:

1. If the sentence was rendered by reason of a false or equivocal document;
2. If the decision was wholly or in part the consequence of an error of fact, positive or negative, resulting from the parts of the procedure or from the documents of the case.

ARTICLE 14

The arbitrator shall indicate the procedure to be followed in the revision. He shall fix the conditions and the brief and preemptory delays in which it shall be heard, by having it bear exclusively upon the matter that has brought it about.

ARTICLE 15

The present treaty shall remain in force during a period of ten years, beginning with the date of the exchange of ratifications.

If it has not been denounced six months before its expiration, it shall be considered as renewed for a new period of ten years, and so on.

ARTICLE 16

The present treaty shall be ratified and the ratifications thereof exchanged at Lima or at Rome as soon as possible.

TRANSITORY ARTICLE

In the first arbitration case that may arise, and if the Parties are not in agreement regarding the designation of the arbitrator or the chief of the third State who shall make the designation, the right to make the said designation, established in this case by Article 2 of the present treaty, shall belong for the first time to that one of the two States that shall in the first place have presented the arbitration proposal.

[982] In faith of which, the two plenipotentiaries have signed the present treaty and sealed the same with their respective seals in duplicate, in Spanish and Italian, at Lima, April 18, 1905.

C

(See No. 1, 7 of the above note)

General arbitration convention between Italy and Denmark

His Majesty the King of Italy and His Majesty the King of Denmark, being inspired by the principles underlying the Convention for the pacific settlement of international disputes, concluded at The Hague on the 29th of July, 1899, and being specially desirous of consecrating the principle of obligatory arbitration in their reciprocal relations by a general arrangement of the nature specified by Article 19 of the said Convention, have decided to conclude a convention to that effect, and have named as their plenipotentiaries, to wit: . . .

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed as follows:

ARTICLE 1

The high contracting Parties agree to submit to the Permanent Court of Arbitration, established at The Hague by the Convention of July 29, 1899, all differences of whatsoever nature which may arise between them and which could not have been settled by diplomacy, and even in case those differences have their origin in events previous to the conclusion of the present convention.

ARTICLE 2

In each individual case the high contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special *compromis* defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods fixed for the formation of the arbitral tribunal and the several stages of procedure.

In the absence of a special *compromis*, the arbitrators shall decide on the basis of the claims formulated by the two Parties.

In the absence of contrary agreement, the arbitration procedure will be regulated by the dispositions established by the Convention, signed at The Hague, on July 29, 1899, for the pacific settlement of international disputes, with the addition of supplementary rules indicated in the following article:

ARTICLE 3

No arbitrator may be a subject of the States signatories of this convention, nor have a domicile in their territories, nor be interested in the questions which shall be the object of the arbitration.

[983] The *compromis* foreseen by the previous article will fix a period before the expiration of which the exchange between the two Parties of statements and documents having reference to the object of the litigation must have taken place.

The decision of the arbitration will contain the indication of the period within which it must be executed.

ARTICLE 4

It is understood that unless the controversy refers to the application of a convention between the two States or in case of a denial of justice, Article 1 will not be applicable to differences which might arise between a subject of one of the Parties and the other signatory State in the case when the courts of justice would have, after the laws of that State, the competence to decide the litigation.

ARTICLE 5

If one of the high contracting Parties should denounce the present convention, this denunciation could only take effect one year after the notification made in writing to the other contracting Party.

ARTICLE 6

The present convention will be ratified with the least possible delay and the ratifications will be exchanged at Rome.

In faith of which the plenipotentiaries have signed the present convention and have affixed thereto their seals.

Rome, December 16, 1905.

D

a. (See No. II, 1-4 of the above note)

If disputes arise concerning the interpretation or execution as well as the consequences of a violation of this treaty, and if it shall not have been possible to solve them by a direct and friendly agreement, they shall be submitted for decision to arbitral commissions and the result of that arbitration shall be obligatory upon the two States.

The members of these commissions shall be appointed by common accord by the two Governments; if an agreement cannot be arrived at, each of the Parties shall name one arbiter or an equal number of arbiters, and these latter shall name another in case of disagreement.

The contracting Parties shall in each case determine the procedure of the arbitration; if an agreement cannot be had in this matter the arbitral commission shall have the power first of all to determine this procedure.

b. (See No. II, 5 of the above note)

Treaty of Commerce with Switzerland

ARTICLE 18

If disputes should arise on the subject of the interpretation of the present treaty, including annexes A to F, and one of the contracting Parties [984] asks that it be submitted to the decision of an arbitral tribunal, the other Party should consent thereto, even for the preliminary question of ascertaining whether the dispute has relation to the interpretation of the treaty. The decision of the arbitrators shall have obligatory force.

Additional provisions, relating to the text of the treaty.

ADDITIONAL ARTICLE 18

With regard to the composition and the procedure of the arbitral tribunal, it is agreed as follows:

1. The Tribunal will consist of three members. Each of the two Parties shall name one of them within the period of fifteen days after the notification of the request for arbitration.

These two arbitrators shall choose the umpire who can be neither a *ressortissant* of one of the two States at issue nor dwell upon their territory. If they do not come to an understanding respecting his choice within a period of eight days, his nomination shall be immediately entrusted to the president of the Administrative Council of the Permanent Court of Arbitration at The Hague.

The umpire shall be president of the tribunal; the latter shall come to its decision by a majority of votes.

2. In the first case of arbitration the tribunal shall sit in the territory of the contracting defendant Party, in the second case in the territory of the other Party, and so on, alternately, in the territory of one or the other, in a town to be designated by the respective Party; the latter shall furnish the quarters as well as the personnel of the bureau and service necessary for the working of the tribunal.

3. The contracting Parties will agree in each special case, or once for all, on the procedure of the arbitral tribunal. In the absence of such an agreement the procedure shall be determined by the tribunal itself. The procedure may be in writing if none of the Parties raise an objection; in this case the provisions of paragraph 2 above are applied only in the degree necessitated by the circumstances.

4. For the summoning and hearing of witnesses and experts, the authorities of each of the contracting Parties shall, on the request of the arbitral tribunal addressed to the respective Governments, lend their assistance in the same way as upon requisitions from the civil courts of the country.

c. (See No. II, 6 and 7 of the above note)

Treaty of Commerce with Austria-Hungary

ARTICLE 15

If there should arise between the high contracting Parties a difference respecting the interpretation or application of the tariffs A and B annexed to

the present treaty, including the additional provisions respecting these tariffs, or on the actual application of the most-favored-nation clause regarding the execution of other conventional tariffs, the dispute, if one of the high contracting Parties so requests, shall be settled by means of arbitration.

[985] For each dispute the arbitral tribunal shall be constituted in the following manner: each of the high contracting Parties shall appoint as arbitrator from among its *ressortissants* two competent persons and they shall agree on the choice of an umpire who is a *ressortissant* of a friendly third Power. The high contracting Parties reserve to themselves the right to designate in advance, and for a period to be determined, the person who should discharge, in case of dispute, the duties of umpire.

When the occasion arises and under the reservation of a special agreement to this effect, the high contracting Parties shall also submit to arbitration the differences which may arise between them on the subject of the interpretation and the application of other clauses of the present treaty than those referred to in the first paragraph.

FINAL PROTOCOL: ADDITIONAL ARTICLE 15

As concerns the procedure of arbitration in the cases referred to in the first and second paragraphs of Article 15, the high contracting Parties have agreed as follows:

In the first case of arbitration the arbitral tribunal shall sit in the territory of the defendant contracting Party, in the second case in the territory of the other Party, and so on, alternately, in the territory of each of the high contracting Parties. The Party in whose territory the tribunal sits shall designate the locality of the sitting; furnish the quarters, the office employees and the service necessary for the working of the tribunal. The tribunal shall be presided over by the umpire. Its decision shall be taken by a majority of votes.

The high contracting Parties shall agree, either in each case of arbitration or for all cases, on the procedure to be followed by the tribunal. In the absence of this agreement the procedure shall be determined by the tribunal itself. The proceedings may be in writing if none of the Parties raises an objection. In this case the provisions of the preceding paragraph may be modified.

For the transmission of summons to appear before the arbitral tribunal and for the letters rogatory emanating from it, the authorities of each of the high contracting Parties shall, on the requisition of the arbitral tribunal addressed to the competent Government, lend their assistance in the same way as they do when it is a matter of requisitions from the civil courts of the country.

d. (See No. II, 8 of the above note)

Convention with Austria-Hungary concerning epizooty

FINAL PROTOCOL

2. If there should arise between the contracting Parties a difference on the application of the convention on epizooty, recourse to the opinion of a mixed commission will take place if one of the contracting Parties so requests. This opinion shall be given equitable weight in the decision to be taken.

Each of the contracting Parties shall appoint two members on this commission which shall have the right to select a fifth member in case no agreement can be reached. In the first case in the formation of a mixed commission, provided there has been no decision to the contrary, the fifth member shall be elected from among the *ressortissants* of one or other of the contracting Parties, in the second place from among those of the other Party, and so on alternately from among the *ressortissants* of one of the contracting Parties. In the first case it shall be decided by lot which of the contracting Parties shall have to furnish the fifth member of the commission.

[986] *e.* (See No. II, 9, 10 and 11 of the above note)

If disputes should arise on the subject of the interpretation or application of the present treaty, including the tariffs and the final protocol, as well as all the questions concerning the exercise of commerce between the two countries, and if one of the contracting Parties requests that they be submitted to the decision of an arbitral tribunal, the other Party must consent thereto even for the preliminary question of ascertaining whether the dispute is of a nature to be referred to the arbitral tribunal.

The arbitral tribunal shall be constituted for each dispute in a manner so that each of the two Parties has to appoint as an arbitrator a qualified *ressortissant,* and that the two Parties choose for the third arbitrator a *ressortissant* of a friendly third Power.

The contracting Parties reserve to themselves the right to agree, in anticipation and for a determined period of time, on the person of the third arbitrator to be designated in case of need.

The decision of the arbitrators shall have obligatory force.

[*See above, the treaty of commerce with Austria-Hungary, Final Protocol, additional Article 15, excepting the addition of the following clause:*]

The contracting Parties will agree upon the distribution of the expenses, either on the occasion of each arbitration or by a provision applicable to all cases. In the absence of an agreement Article 17 of the Hague Convention shall be applied.

Annex 67

TREATIES RELATIVE TO ARBITRATION SIGNED BY THE FIVE CENTRAL AMERICAN REPUBLICS, COMMUNICATED TO THE CONFERENCE BY THE DELEGATION OF GUATEMALA

The delegation of Guatemala has the honor to present for the examination of the members of the Conference in a purely documentary form the latest treaties containing clauses of arbitration signed recently between the five Republics of Central America, to wit:

1. Treaty of peace and arbitration between Guatemala, Salvador and Honduras, July 20, 1906;

2. General treaty of peace, arbitration, extradition and commerce between Guatemala, Costa Rica, Honduras and Salvador of September 25, 1906; and

3. Treaty of peace and arbitration between Salvador and Nicaragua of April 23, 1907.[1]

The same desire to establish perpetual peace among the different States and to strengthen and increase their good relations is predominant in these
[987] treaties. The obligation of a recourse to arbitration that they impose, embraces all questions that may in the future arise between the contracting Parties which—as remarked in the preamble of the present treaty of San José, Costa Rica,—are united by ties of family, race and language, upon the strength of which rests the legitimate hope of Central America for the reconstitution of the old fatherland; the grouping of these States once more under one flag.

The Republic of Guatemala has for a long time made the fulfillment of its international treaties and the improvement and development of its relations with its sister republics the basis of its foreign policy.

Treaty of peace and arbitration between the Republics of Guatemala, Salvador, and Honduras

The friendly initiative of their Excellencies Theodore Roosevelt, the President of the United States of America, and General Porfirio Diaz, President of the United States of Mexico, having been accepted by the Governments of the Republics of Salvador, Guatemala, and Honduras to discuss the bases upon which peace, unfortunately interrupted between the three republics, is to be established, and to assure as far as possible the permanent enjoyment of its benefits, Messrs. José Rosa Pacas and Salvador Gallegos, delegates from the Republic of Salvador, Francisco Bertrand, delegate from the Republic of Honduras, and Arturo Ubico, José Pinto, Juan Barrios M. and Manuel Cabral, delegates from the Republic of Guatemala, assembled on board the cruiser *Marblehead* of the United States Navy, and after examining their respective credentials and fully deliberating on the object of the Conference, under the honorary presidency of their Excellencies William Lawrence Merry and Leslie Combs, ministers plenipotentiary of the United States to the Republics of Salvador, Guatemala and Honduras, and of his Excellency Frederico Gamboa, minister plenipotentiary of the United States of Mexico, the first-named being besides, the special delegate from the Republic of Costa Rica to the Conference of Peace, to which also attended in the same capacity, Mr. Modesto Barrios, for the Republic of Nicaragua; they have agreed upon the following terms:

First: The Republics of Salvador and Honduras return to a state of peace with the Republic of Guatemala, relegating to oblivion their past differences. Consequently, they will concentrate their respective armies within three days counted from that following the signing of the present convention, and will disarm them within the subsequent eight days, leaving only the garrisons ordinarily maintained in their cities and the movable detachments serving on police duty.

Second: The contracting Parties will reciprocally deliver the prisoners of war and will care for, free of charge, the wounded who may be in their respec-

[1] This treaty has not been in force since June 11, 1907.

tive territories, until they may be able to return to their homes, or may be demanded by their respective Governments.

In the same manner all political prisoners now held shall at once be placed at liberty; and each delegation shall recommend to its respective Government that a general amnesty be decreed as soon as possible.

[988] *Third:* The high contracting Parties bind themselves to concentrate the political refugees who are in or may come to their respective territories, as also to exercise surveillance over their conduct in order to prevent their taking improper advantage of their asylum and their machinations against the tranquillity and public order of the country whence they may have emigrated.

Fourth: Within two months from this date the contracting Parties shall celebrate a general treaty of peace, amity and navigation, and the capital of the Republic of Costa Rica is hereby designated for the meeting of the representatives of the three Governments fully authorized for their negotiations.

In the meantime it is agreed that all international stipulations binding the contracting Parties shall remain in force, and specially those of the Second Pan American Conference assembled at Mexico.

Fifth: If, contrary to expectations, any one of the high contracting Parties shall fail in the future in any of the points agreed upon in this treaty, or should give cause for new differences, these shall be submitted to arbitration, their Excellencies the President of the United States of America and of the United States of Mexico, being hereby designated as arbitrators, to whose arbitration shall also be submitted the recent actual difficulties between Guatemala, Salvador, and Honduras.

The present Convention remains under the guaranty of the loyalty of the Governments interested and of the moral sanction of the Governments of the mediating and participating nations.

Without prejudice to the immediate execution of this treaty the exchange of the ratifications shall take place by exchange of notes in the cities of Guatemala, San Salvador and Tegucigalpa, at the latest on the thirtieth of the current month,

In witness whereof we sign and seal the present Treaty on board the American cruiser *Marblehead,* this twentieth day of the month of July in the year one thousand nine hundred and six.

(L.S.) Arturo Ubico, J. Pinto, Juan Barrios M., Manuel Cabral,
(L.S.) F. Bertrand, J. R. Pacas,
(L.S.) Salvador Gallegos,
(L.S.) William Lawrence Merry, Leslie Combs, F. Gamboa,
Honorary Presidents.
(L.S.) Modesto Barrios,

At the invitation of the legations:
R. T. Mulligan, U. S. N., Commanding *Marblehead.*

By appointment from Minister William L. Merry, as the representative of the Government of Costa Rica, Salvador Gallegos.

[989]

General treaty between Guatemala, Salvador, Honduras, and Costa Rica

The Governments of the Republics of Guatemala, Salvador, and Honduras, in conformity with the stipulations of the treaty of July 20, 1906, concluded on board of the American cruiser *Marblehead,* and the Republic of Costa Rica acting on invitation of said countries, and desirious to be present at this act which concerns the entire Central American Fatherland, for the purpose of establishing peace on firm and stable foundations and binding closer their family relations and the ties which must unite them because of their common destiny, through the delegates hereafter to be named, have held various meetings in conference spreading upon the several minutes of the Protocol thus formed the conclusions reached on such an important subject; and all being desirious to give said agreements a more solemn form, they have concluded to embody them in a general treaty.

The representatives were, on behalf of the Republic of Guatemala, their Excellencies, Dr. Francisco Anguiano and Licentiate Don José Flamenco; on behalf of Salvador, their Excellencies, Drs. Don Salvador Gallegos and Don Salvador Rodriguez Gonzáles; on behalf of Costa Rica, his Excellency, Licentiate Don Luis Anderson; and on behalf of Honduras, his Excellency, General Sotero Barahona, who after having presented their respective full powers, found to be in good and due form, have agreed to the following articles:

Article 1

There shall be perpetual peace and a frank, loyal, and sincere friendship among the Republics of Guatemala, Salvador, Costa Rica, and Honduras, each and everyone of the aforesaid Governments being in duty bound to consider as one of their principal obligations the maintenance of such peace and the preservation of such friendship, by endeavoring to contribute every means to procure the desired end, and to remove, as far as lies in their power, any obstacles, whatever their nature, which might prevent it. In order to secure such ends they shall always unite, when the importance of the case demands it, to foster their moral, intellectual and industrial progress, thus making their interests one and the same, as it becomes sister countries.

Article 2

In the event, which is not to be expected, that any of the high contracting Parties should fail to comply with or cause any deviation from any of the subjects agreed to in the present treaty, such event, as well as any particular difficulty which may arise between them, shall necessarily be settled by the civilized means of arbitration.

Article 3

The Governments of Salvador, Guatemala, and Honduras, in conformity with the stipulations of the treaty executed on board the *Marblehead,* hereby appoint as umpires, their Excellencies the Presidents of the United States of America and of the United Mexican States, to whom all particular difficulties arising among said Governments shall be submitted for arbitration.

For the purpose of agreeing on the manner to effect such arbitration, the above-mentioned republics shall accredit, at the latest within three months from this date, their respective legations near the Governments of the United States of America and Mexico, and in the meanwhile arbitration shall be ruled according to the stipulations of the treaty of compulsory arbitration concluded in Mexico on January 29, 1902.

ARTICLE 4

Guatemala not having subscribed to the Corinto Convention of January 20,
[990] 1902, Costa Rica, Salvador, and Honduras do hereby respectively declare, that said Corinto convention is to continue in force, and that any particular difference which may arise among them shall be settled in conformity with the aforesaid convention and with the regulations established by the Central American Court of Arbitration on October 9 of that year.

ARTICLE 5

Citizens of any of the high contracting Parties, resident in the territory of any of the other Parties, shall enjoy the same civil rights as native citizens, and shall be considered as naturalized citizens of the country of residence, provided they possess the qualifications required by the respective constitutional laws and have declared before the respective departmental authorities their intention of becoming citizens; or that they accept any public office or charge, in which case such intention is presumed. Non-naturalized citizens shall be exempt from obligatory military service, either by sea or land, and from all forced loans, levies, or military requisitions, and under no circumstances shall they be obliged to pay more assessments, ordinary or extraordinary taxes, than those to which native citizens are subject.

ARTICLE 6

The diplomatic agents of each of the high contracting Parties shall exercise their good offices in order that due justice shall be administered their fellow citizens. It is well understood, however, that in the defense and protection of their rights and interests, and in their claims and complaints against the nation or private individuals, no other proceedings shall be resorted to than those which the laws of each signatory republic may provide for their respective citizens, and they must conform to the final decision of the courts of justice.

ARTICLE 7

Those who may have acquired a professional, literary, artistic, or industrial title in any of the contracting republics shall be free to practise in any of the other countries, without any restraint whatever, their respective professions, arts, or trades, in conformity with the laws of the country of their residence, and without any other previous requirements than the presentation of the proper title or diploma, duly authenticated, and, in case of need, to establish the identity of the person and to obtain the approval of the executive power in case the law should so require.

Scientific or literary studies made in the universities, technical schools, institutes of secondary education in any of the contracting countries, shall also be valid after presentation of the proper authenticated documents certifying to such studies and corresponding identification.

ARTICLE 8

Citizens of any of the signatory countries residing within the territory of any of the others, shall enjoy the right of literary, artistic, or industrial property (copyright) on the same terms and subject to the same requirements as those applying to their native-born citizens.

[991] ARTICLE 9

Commerce between the Republics of Salvador, Guatemala, and Honduras of articles of their growth, produce, or manufacture, whether by sea, or through their land frontiers, shall be exempt from all fiscal duties, and shall not be burdened with any local or municipal import dues.

In case of Salvador and Guatemala this exemption does not apply to their export duties. Products manufactured in the country with foreign raw material are excepted, and they shall only pay 50% of the duty assessed upon them on their reciprocal importation from one country to another.

Notwithstanding the stipulations contained in the foregoing paragraph, the Governments of the high contracting Parties shall frame, of common accord, all such measures as may tend to prevent fraud under the exceptions herein stipulated.

ARTICLE 10

In order that such national products, either natural or manufactured, may enjoy the exemption aforesaid, the political authority from the country of origin shall be required to certify to the origin of said article; and custom-house collectors, at the port of shipment, shall certify in a similar manner that such product is a natural product of the respective country and that its origin is genuine.

ARTICLE 11

The exemptions contained in the foregoing article shall not apply—

1. In respect to Guatemala and Salvador, to salt and sugar.
2. To the natural or manufactured products the monopoly of which actually is or may hereafter be established in each of the contracting republics for the benefit of the State.
3. To articles of illicit commerce, and, in general, to all such articles that the Governments may agree to exempt.

ARTICLE 12

Whosoever in any manner defraud, or intend to defraud, the public treasury of any of the contracting Parties under cover of any of the provisions of this treaty shall be prosecuted and punished as the fiscal laws of the respective countries may prescribe.

ARTICLE 13

In respect to the commercial relations between the above-mentioned republics and Costa Rica, it is agreed, as a general proposition, that free importation shall be limited, for the present, only to such national products as cannot be obtained in any of the other countries in quantities sufficient to meet the necessities of consumption, such articles to be freely designated and the extent of the exemp-

tions established for each year by correspondence between the respective departments during the preceding year.

ARTICLE 14

The merchant vessels of any of the four contracting Parties shall be regarded as national (home) vessels while on the seas, coasts, and ports of any of the other countries. They shall enjoy the same exemptions, franchises, and concessions accorded to such vessels, and shall pay no other dues, nor be burdened with other charges than those affecting vessels of the respective countries.

[992] ARTICLE 15

Diplomatic and consular agents of the contracting republics in foreign cities, towns, or ports shall extend to the persons, vessels, and other property of the citizens of any of the aforesaid republics the same protection due to the persons, vessels, and other property of their respective fellow-citizens, and they shall not ask for such services any other or higher fees than those usually charged in the case of their own fellow-citizens.

ARTICLE 16

With a view to encourage commerce among the contracting republics, their respective Governments shall take the necessary steps tending to an agreement for the establishment of a national merchant marine for the coastwise trade, or to make contracts with, or grant subsidies to, the steamship companies carrying on the trade between San Francisco, California, and Panama, and between Colon and Puerto Barrios.

ARTICLE 17

The high contracting Parties, recognizing the necessity and great advantage of promoting and supporting the establishment of the best means of communication between the respective States, hereby agree to grant, as each country may determine within its own territory, the necessary concessions for the construction of railroads and the establishment of new submarine cables and wireless telegraph stations.

They equally bind themselves to improve as much as possible their telegraphic and telephonic means of communication, it being agreed that telegraphic communication shall not be subject to any higher rates than those established by the respective tariffs for interior service in each republic.

ARTICLE 18

There shall exist among the contracting Governments a complete and regular exchange of official publications of all kinds. This exchange also applies to all scientific and literary publications made within their respective territories by private individuals, and to this end every publisher and owner of a printing establishment shall be bound to supply their respective department of foreign relations, immediately after publication, with the necessary copies for the exchange.

For the purpose of due preservation and easy consultation, each Government shall deposit one copy of said publications in such public library as it is deemed convenient.

ARTICLE 19

Public instruments delivered in one of the contracting republics shall be valid in the others, when duly authenticated and made in accordance with the laws of the republic where they originate.

ARTICLE 20

The judicial authorities of the contracting republics shall execute all requisitions in civil, commercial, or criminal matters relating to summons, examinations, and other legal proceedings.

Other judicial acts in civil or commercial matters growing out of personal actions shall have within the territory of any of the high contracting
[993] Parties the same force as in the respective local courts, and shall be executed as in the latter when duly authorized by the supreme tribunal of the republic wherein they are to be executed. Such authorization exists when the essential conditions required by each particular legislation, as well as the rules governing in each country the execution of sentences, have been complied with.

ARTICLE 21

The contracting republics, desirious that crimes and offenses committed within their respective territories shall not be left unpunished, and in order to prevent that criminal responsibility should be evaded by the escape of the offender, do hereby agree reciprocally to surrender persons seeking refuge within their respective territories, charged with, or convicted of, having committed in any of the countries, either as principals or as accessories, any of the following crimes: homicide, arson, robbery, piracy, embezzlement, abigeat (cattle stealing), counterfeiting of money, forgery of public documents, breach of trust, malversation of public funds, fraudulent bankruptcy, perjury and, in general, any crime or offense that can be prosecuted without the necessity of a formal accusation, and which the common penal code of the country wherein the crime was committed punishes by imprisonment for a period exceeding two years, even when the penalty for that particular crime is less, or different, in the country where the criminal has taken refuge.

ARTICLE 22

The penalty of two years' imprisonment establishes the nature of the extraditable crime or offense when such extradition is requested during the judicial proceedings, but does not limit the effects of the proceedings if, either by extenuating circumstances or other evidence favorable to the accused person, he will be condemned to a lighter penalty.

Should extradition be requested by virtue of the sentence of a court, the accused person shall be surrendered in case the penalty inflicted be no less than imprisonment for one year.

ARTICLE 23

No extradition shall be granted in the case of a person under sentence for, or charged with a political crime, or offense, even when such crime or offense may have been committed in connection with another crime or offense for extradition.

It devolves upon the courts of justice of the republic where the fugitive is found to determine the nature of political crimes or offenses.

The person surrendered cannot be tried or condemned for political crimes or offenses or other acts in connection thereof, committed prior to the extradition.

ARTICLE 24

Extradition shall not be granted:

1. If the offender whose extradition is requested has already been tried and sentenced for the same act committed in the republic where he resides.

2. If the act for which extradition is requested is not considered as a crime or offense in the republic where he resides; and

3. If in conformity with the laws of the claiming republic, or that of refuge, the action or penalty was prescribed.

If the person whose extradition is requested has been charged with or condemned in the country of refuge for an offense or crime committed
[994] within its territory, he shall not be surrendered until acquitted by sentence of the court, or, in case of having been condemned, not until such sentence has been filled, or he has been pardoned.

In case of urgency, temporary detention of the accused may be requested by telegraphic or postal communication to the minister of foreign relations, or through the respective diplomatic agent or consul, in default of the former. Such temporary arrest shall conform with the rules established by the laws of the country, but, if within a month, reckoned from the day when the arrest was effected, no formal demand of the prisoner has been made, such temporary arrest shall cease.

ARTICLE 25

The high contracting Parties are not bound to surrender their respective citizens, but they shall prosecute them for violations of the penal code committed in any of the other republics, and the Government in whose territory such violation was committed shall transmit to that of the nationality of the accused all such proceedings, information, and documents in the case, as well as the objects constituting the *corpus delicti,* and all other evidence necessary to establish the guilt and to expedite the action of the court. This being done, the trial shall proceed to its end, and the Government of the country of trial shall inform the other interested Governments of the final disposition of the case.

ARTICLE 26

Extradition shall always be granted, even in case the alleged offender may fail, because of his surrender, to discharge contractual obligations. In such cases the interested parties shall have the right to bring the proper action before the competent judicial authorities.

ARTICLE 27

The surrender shall always be made on condition that, if the penalty attached to the crime or offense for which the extradition is requested is not the same in the claiming nation as in the nation of refuge, the lower penalty shall be applied to the offender, and in no case the death penalty.

ARTICLE 28

If the accused or condemned person whose extradition is requested should be equally claimed by one or more of the Governments for crimes committed by

him within their respective jurisdiction, he shall be surrendered in preference to the Government having first demanded his extradition.

ARTICLE 29

For the extradition of criminals the respective signatory Governments shall negotiate either directly or through diplomatic channels. In submitting the request for extradition specifications shall be made of the evidence which, in accordance with the laws of the republic where the offense or the crime was committed, is sufficient to justify the arrest and trial of the accused.

The sentence, accusation, warrant of arrest, or any other equivalent legal proceedings shall also be submitted, stating the nature and gravity of the alleged offenses and the penal dispositions applicable thereto. In case of escape of the offender after sentence has been passed, or before the penalty has been fully completed, the requisition shall relate such circumstances and be accomplished only by the sentence.

[995] ARTICLE 30

In order to facilitate proof of ownership of the property stolen or taken from one of the Republics to any of the others, the authorization and authentication of the proper documents may be made by the highest political authorities of the department wherein the crime has been committed, and pending the appearance of the interested parties the judicial authority of the country where such property is found shall direct it to be deposited, and to this end a telegraphic request from any of the authorities above mentioned shall be sufficient. Upon the establishment of the right ownership of said property it shall be delivered to the proper owners, even when the offender is not amenable to extradition, or when such extradition has not been decreed.

ARTICLE 31

In all cases when the detention of the fugitive is demanded, he shall be informed within twenty-four hours that extradition proceedings shall be instituted against him, and that, within the preemptory term of three days from notification, he may oppose such extradition by alleging:

1. That he is not the person whose extradition is requested;
2. Any material defects that may exist in the submitted documents;
3. That the request for extradition is contrary to law.

ARTICLE 32

In case the proof of the alleged facts is needed, proceedings shall be had in accordance with the prescriptions contained in the laws of procedure of the republic to which the request has been made.

When the proof has been established, judgment shall be passed, without further proceedings, within ten days, establishing whether extradition shall be granted or not.

Against such decision, and within three days following its notification, the legal remedy granted by the laws of the country where the fugitive is found shall be granted, but five days at the latest, after the expiration of this term, final judgment shall be passed.

ARTICLE 33

Expenses incurred by reason of arrest, support, and transportation of the person whose surrender is requested, as well as the expenses incurred in the delivery and transportation of the property to be returned or forwarded because of its connection with the crime or offense, shall be defrayed by the republic making the request.

ARTICLE 34

The high contracting Parties do hereby solemnly declare that they do not hold themselves, nor do they hold the other Central American Republics, as foreign nations, and that they shall continuously endeavor to preserve among them all their family ties and the greatest cordiality in their reciprocal relations, uniting in a common cause in case of war or difficulties with foreign nations, and amicably and fraternally mediating in case of private disturbances.

ARTICLE 35

In their endeavor to maintain peace and to forestall one of the most frequent causes of disturbance in the interior of the republics and of restlessness and distrust among the Central American people, the contracting Governments [996] shall not allow the leaders or principal chiefs of political emigration, nor their agents, to reside near the frontier of the countries whose peace they seek to disturb. Neither shall they employ in their respective armies emigrants from any of the other republics and, should the interested Governments so request, such emigrants shall be concentrated at one point. Should the political emigrants resident in any of the contracting republics incite or encourage revolutionary work against any of the other republics, they shall forthwith be exiled from the respective territory. All these measures shall be enforced irrespective of the nationality of the person against whom issued; but any Government issuing such orders shall weigh the burden of the proof submitted or the evidence obtained by such Government.

ARTICLE 36

The present treaty is of a perpetual nature and always obligatory as regards peace, friendship and arbitration, but as regards commerce, extradition and other stipulations it shall remain in full force for a term of ten years from the date of exchange of the ratifications. If, however, one year before the expiration of such term none of the high contracting Parties shall have officially notified the others of its intention to terminate the treaty as stated, it shall continue to be obligatory for one year after the said notification.

ARTICLE 37

This treaty shall be ratified and the ratifications exchanged in the city of San Salvador within two months from date of the last ratification.

ARTICLE 38

As the principal stipulations contained in the treaties made heretofore between the contracting countries are condensed or properly modified in the foregoing treaty, it is hereby declared that all such former treaties shall remain

without effect and be abrogated when the present treaty is duly approved and the exchange of ratifications has been made.

In faith whereof the respective plenipotentaries have signed and sealed the foregoing treaty in the city of San José de Costa Rica on the twenty-fifth day of the month of September one thousand nine hundred and six.

(L.S.) F. Anguiano.
(L.S.) José Flamenco.
(L.S.) Salvador Gallegos.
(L.S.) Salvador Rodriguez.
(L.S.) Luis Anderson.
(L.S.) Sotero Barahona.

Treaty of peace, friendship and commerce between Salvador and Nicaragua

The undersigned, José Dolores Gamez, Minister for Foreign Affairs of the Republic of Nicaragua, and Ramon Garcia Gonzalez, Minister for Foreign Affairs of the Republic of Salvador, each in the representation of his respective Government, and fully authorized according to the full powers exhibited [997] and which were found to be in good and due form, after extensive discussion and with the friendly mediation of Mr. Philip Brown, chargé d'affaires of the United States near the Government of the Republic of Honduras, have agreed to sign the treaty of peace, friendship, and commerce contained in the following clauses:

Article 1

The good harmony and friendly relations existing between the signatory Governments having been altered in consequence of the late war between Nicaragua and Honduras, in which the Government of Salvador found itself obliged to intervene on account of its alliance with the Government of Honduras that was presided over by General Manuel Bonilla, and taking in consideration the urgent reasons for the necessity and expediency of restoring peace between both countries, they have mutually agreed, after protracted discussions, to reestablish the friendly relations, which were temporarily interrupted, on the basis of good faith, which ought to prevail in the friendly understanding of the two sister republics.

Article 2

Peace being reestablished by the present treaty, the signatory Governments herewith agree that Nicaragua is to issue an invitation to the other Governments of Central America to attend a Central American Congress that will be held at Corinto; pursuant to the propositions made by the representatives of the Governments of these republics conjointly with the American Secretary of State in Washington, this congress will be composed of representatives of the five sister Republics, who will have full powers to conclude a general treaty of peace and friendship having obligatory arbitration for a basis, to replace the former treaties of the same nature celebrated at Corinto and at San José, Costa Rica, with the purpose of avoiding in the future armed conflicts between sister republics. The representatives of the five republics will moreover be able to conclude arrangements in reference to commerce, navigation and any other questions that they may judge profitable to Central American interests.

ARTICLE 3

While the disposition of the foregoing clause is being complied with, it remains stipulated herewith that any difference that may arise in the future between Salvador and Nicaragua that might alter their good relations shall be settled by means of the obligatory arbitration of the President of the United States and of Mexico, conjointly, who shall have the power, in case of not having arrived at an agreement, to name a third person, whose decision shall be definitive. The President of Mexico will have the right to delegate his faculties as arbitrator to the Mexican ambassador at Washington or to whomever he may designate.

ARTICLE 4

As a manifestation of the sincerity with which the signatory Governments have proceeded, and also of the confidence that they have in the fulfillment of all the clauses of this treaty, they offer with the best intentions to issue in their respective countries a decree of unconditional and ample amnesty in favor of their countrymen who may have taken opposite sides in the last events of Honduras.

ARTICLE 5

Salvador and Nicaragua solemnly pledge themselves to sign a treaty of commerce on the basis of free exchange.

[998] ARTICLE 6

The present treaty shall be ratified and the ratifications shall be exchanged in the city of Managua or at San Salvador, one month after the last ratification or before that time if possible.

In witness whereof, the negotiators have signed the present treaty in triplicate, conjointly with Mr. PHILIP BROWN, chargé d'affaires of the United States near the Governments of Honduras and Guatemala, who has interposed his good offices and the moral authority of the country which he represents. Done at Amapala this twenty-third day of April in the year one thousand nine hundred and seven.

(L.S.) RAMON GARCIA GONZALEZ.
(L.S.) JOSÉ D. GAMEZ.
(L.S.) PHILIP BROWN.

Annex 68

ARTICLE 10 OF THE PROPOSITION OF THE COMMITTEE OF EXAMINATION PRESENTED JULY 5, 1899, TO THE THIRD COMMISSION OF THE FIRST PEACE CONFERENCE[1]

ARTICLE 10

Arbitration will be obligatory between the high contracting Parties in the following cases, so far as they do not concern the vital interests or national honor of the States in dispute:

[1] See the declaration made by the Greek delegation in the meeting of July 18, 1907.

I. In case of disputes concerning the interpretation or application of the conventions mentioned below:

1. Conventions relating to posts, telegraphs, and telephones.
2. Conventions concerning the protection of submarine cables.
3. Conventions concerning railroads.
4. Conventions and regulations concerning means of preventing collisions of vessels at sea.
5. Conventions concerning the protection of literary and artistic works.
6. Conventions concerning the protection of industrial property (patents, trade-marks, and trade names).
7. Conventions concerning the system of weights and measures.
8. Conventions concerning reciprocal free aid to the indigent sick.
9. Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences.
10. Conventions concerning civil procedure.
11. Conventions of extradition.
12. Conventions of delimitation, so far as they concern purely technical and non-political questions.

II. In case of disputes concerning pecuniary claims for damages when the principle of indemnity is recognized by the parties.

MODIFICATIONS

PROPOSED TO THE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES OF JULY 29, 1899

SECOND PART

TITLE IV, CHAPTER I, ARTICLES 15 TO 19

[1] The first and third parts have not been reproduced in this volume.

[1000-1001]

I Convention of 1899	II Proposition of the United States of America (Annex 48)	III Proposition of Uruguay (Annex 47)	IV Serbian Proposition (Annex 18)	V Portuguese Proposition (Annex 19)	VI Proposition of the United States of America (Annex 20)	VII Swedish Proposition (Annex 22)	VIII Dominican Proposition (Annex 51)	IX Chilean Proposition (Annex 52)	X Brazilian Proposition (Annex 23)	XI Italian Proposition (Annex 43)
PART IV.—On International Arbitration										
Chapter I.—The System of Arbitration										
Article 15 International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.						Article 15 International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the arbitral award.				
Article 16 In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.	For the purpose of avoiding between nations armed conflicts of a purely pecuniary origin, arising from contract debts, which are claimed as due to the subjects or citizens of one country by the Government of another country, and in order to guarantee that all contract debts of this nature which it may have been impossible to settle amicably through the diplomatic channel shall be submitted to arbitration, it is agreed that there cannot be recourse to any coercive measure, involving the employment of military or naval forces for the recovery of such contract debts, until an offer of arbitration has been made by the creditor and refused or not answered by the debtor, or until arbitration has taken place and the debtor State has failed to comply with the award made. It is further agreed that such arbitration shall conform, as to its procedure, to Chapter III of the Convention for the pacific settlement of international disputes, adopted at The Hague, and that it shall determine the equity and the amount of the debt, the time and manner of its settlement and the guaranty to be given, if there is occasion, while payment is delayed.	1. As soon as ten nations (of which half shall have at least 25,000,000 inhabitants each) shall agree to submit to arbitration differences which may arise among them, they shall have the right to form an alliance for the purpose of examining the disagreements and disputes which may arise among them and to intervene when they deem it advantageous to secure the most just solution. 2. The allied nations may establish a court of obligatory arbitration at The Hague (if the Kingdom of Holland is a party to the alliance) or in another city designated for that purpose. 3. The alliance in favor of obligatory arbitration shall intervene only in cases of international disputes, and shall not interfere with internal affairs of any country. 4. All nations which shall conform to the principle of obligatory arbitration shall have the right to become parties to the alliance intended to abolish the evils of war.	Article 19 Independently of general or special treaties which at present provide or shall provide in future for obligatory arbitration as between the contracting States, the signatory Powers to the present Convention bind themselves to resort to arbitration and to submit their disputes to the Arbitration Court at The Hague: *a.* For everything that concerns the interpretation or application of treaties of commerce, and conventions and agreements, under any form whatever, which are annexed thereto, as well as for all other treaties, conventions, agreements concerning the adjustment of economic, administrative and judicial interests. *b.* For everything that concerns the execution of pecuniary agreements, the payment of indemnities or reparation for material damages between States or between a State and the subjects of other States, so far as the ordinary courts are not competent.	New Article (*replacing Article 16*) The high contracting Parties agree to submit to arbitration differences of a legal nature or relating to the interpretation of treaties existing between the signatory Powers, which may arise among them and which cannot be settled by direct diplomatic negotiation, subject however to the condition that they do not involve either the vital interests or independence of the parties in dispute, or the interests of third Powers. Article 16 *a* It is understood that each of the contracting Powers has the exclusive right to determine whether any difference which may arise involves its vital interests or independence, and consequently is of such a nature as to be excepted from arbitration. Article 16 *b* The high contracting Powers agree not to avail themselves of the preceding article in the following cases: 1. Disputes concerning the interpretation or application of conventions already concluded or to be concluded and enumerated below: (*a*) Treaties of commerce and navigation. (*b*) Conventions regarding the international protection of workmen. (*c*) Postal, telegraph (including wireless), and telephone conventions. (*d*) Conventions concerning the protection of submarine cables. (*e*) Conventions concerning railroads. (*f*) Conventions and rules concerning means of preventing collisions at sea. (*g*) Conventions concerning the protection of literary and artistic works. (*h*) Conventions concerning industrial property (patents, trademarks, and trade names). (*i*) Conventions concerning regulation of commercial and industrial companies. (*k*) Conventions concerning monetary and metric systems (weights and measures). (*l*) Conventions concerning reciprocal free aid to the indigent sick. (*m*) Sanitary conventions, conventions concerning epizooty, phylloxera, and other similar pestilences. (*n*) Conventions relating to matters of private international law. (*o*) Conventions concerning civil or criminal procedure. (*p*) Extradition conventions. (*q*) Diplomatic and consular privileges. 2. Establishment of boundary marks. 3. Disputes concerning pecuniary claims for damages when the principle of indemnity is recognized by the parties. 4. Questions relating to debts.	Article 1 Differences of a legal nature or relating to the interpretation of treaties existing between two or more of the contracting States which may arise in the future, and which cannot be settled by diplomatic means, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, subject, however, to the condition that they do not involve either the vital interests, or independence, or honor of any of the said parties, and that they do not concern the interests of other States not parties to the dispute. Article 2 Each signatory Power shall be the judge of whether the difference which may arise involves its vital interests, independence, or honor, and consequently is of such a nature as to be comprised among those cases which are excepted from obligatory arbitration, as provided in the preceding article. Article 3 In each particular case the high contracting Parties (the signatory Powers) shall conclude a special *compromis* (special protocol) conformably to the constitutions or laws of the high contracting Parties (signatory Powers), defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure and the details to be observed in the matter of the constitution of the arbitral tribunal. Article 4 The present convention shall be ratified as speedily as possible. The ratifications shall be deposited at The Hague. A *procès-verbal* shall be drawn up recording the receipt of each ratification and a copy duly certified shall be sent, through the diplomatic channel, to all of the Powers which were represented at the International Peace Conference at The Hague. Article 5 In the event of one of the high contracting parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers. This denunciation shall have effect only in regard to the notifying Power.	With a view to avoiding armed conflicts between nations, all claims of a purely pecuniary origin, whether proceeding from public loans or other contract debts, or from damages and losses, when presented by a Government in the name of its nationals, shall be submitted to international arbitration whenever it may not have been possible to settle them amicably through the diplomatic channel. No coercive measure, involving the employment of military or naval forces can be taken against the debtor State unless it refuses the arbitration proposed by the claimant State, or fails to submit to the award made by the arbitral tribunal. It is further agreed that this arbitration shall determine the justice and the amount of the claims, the time and manner of their settlement, conforming as to procedure with the rules of Chapter III of the Convention for the pacific settlement of international disputes, adopted at The Hague.	The delegation of Chile, inspired by the desire to seek means of conciliation for the pacific settlement of the disagreements which most often appear in the ordinary course of international relations, has the honor to submit the following proposition to the consideration of the Conference: The contracting Parties engage to submit to arbitration all claims of subjects or citizens of one State against another State, in such cases as negotiations through the diplomatic channel are unable to bring about a satisfactory agreement, and when the claims are of a pecuniary character, proceeding from damages and interest, or from the violation of contracts in which the contracting Parties themselves cannot determine the authority and the procedure to which they should appeal to settle future disagreements. The contracting Parties likewise engage to submit to the Hague tribunal the final resolution of the questions or difficulties mentioned, in case they do not consider it preferable to agree to the establishment of a special tribunal for the settlement of the question.	Article 1 In questions where they do not reach an agreement by diplomatic means or through good offices and mediation, if these questions do not affect the independence, territorial integrity, or vital interests of the parties, their institutions or internal laws, or the interests of third Powers, the signatory Powers bind themselves to resort to arbitration before the Permanent Court at The Hague, or if they prefer, through the nomination of arbitrators of their choice. Article 2 It is understood that the signatory Powers always reserve the right not to resort to arbitration until after good offices and mediation, if they are willing to resort to the latter methods of conciliation first. Article 3 In disputes relating to inhabited territories, recourse shall not be had to arbitration except with the prior consent of the peoples interested in the decision. Article 4 Each interested party shall decide finally whether the dispute involves its independence, territorial integrity, vital interests or institutions. (The first delegate of the United States of Brazil, his Excellency Mr. Ruy Barbosa, preceded the reading of the Brazilian proposition, in the meeting of July 9 last, with the following declaration: "In case agreement is established on the principle of obligation applied to international arbitration for conflicts of a legal character or concerning the interpretation of treaties, whatever may be the formula adopted, the Government of the Republic of the United States of Brazil declares at the outset that it does not consider and shall not consider that this principle may be extended to questions and disputes already existing, but only to those which may arise after its act of adhesion of June 14, 1907, to the First Convention of the First Hague Conference.")	The signatory Powers state that the principle of obligatory arbitration is applicable to disputes which have not been settled through diplomatic channels and which concern questions of a legal nature, more especially questions as to the interpretation or application of international conventions. Consequently they engage to study most carefully and as soon as possible the question of the application of obligatory arbitration. Such study must be completed by December 31, 1908, at which time, or even earlier, the Powers represented at the Second Hague Conference will notify each other reciprocally, through the Royal Netherland Government, of the matters which they are ready to include in a stipulation concerning obligatory arbitration.
Article 17 The arbitration convention is concluded for questions already existing or for questions which may arise eventually. It may embrace any dispute or only disputes of a certain category.						Article 17 Each of the Parties in dispute is judge of whether the difference which may arise involves its vital interests or independence, and, consequently, is of such a nature as to be comprised among those cases which, according to the preceding article, are excepted from obligatory arbitration.				
Article 18 The arbitration convention implies an engagement to submit in good faith to the arbitral award.						Article 18 The signatory Powers agree not to avail themselves of the exceptions contained in Article 17 in the following cases, wherein arbitration shall in all instances be obligatory: 1. In case of pecuniary claims for damages when the principle of indemnity is recognized by the parties in dispute. 2. In case of pecuniary claims when it is a question of the interpretation or application of conventions of every kind between the litigant parties. 3. In case of pecuniary claims arising from acts of war, civil war or so-called pacific blockade, the arrest of foreigners or the seizure of their property.				
Article 19 Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present act or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.						Article 19 The preceding articles do not detract from general or special treaties which at present provide a more extended recourse to arbitration by the signatory Powers. These Powers reserve to themselves the right of concluding, either before the above articles become effective or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.				

[1003]

DRAFTS OF CONVENTION VOTED BY THE COMMISSION

Annex 70

DRAFT OF REVISION OF THE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

PART 1.—The Maintenance of General Peace

Article 1

With a view to obviating so far as possible recourse to force in the relations between States, the signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences.

PART II.—Good Offices and Mediation

Article 2

In case of serious disagreement or dispute, before an appeal to arms, the signatory Powers agree to have recourse, so far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the signatory Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

[1004]

Article 6

Good offices and mediation, undertaken either at the request of the parties in dispute, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.

ARTICLE 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted, unless there be an agreement to the contrary.

ARTICLE 8

The signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

PART III.—INTERNATIONAL COMMISSIONS OF INQUIRY

ARTICLE 9

In disputes of an international nature involving neither honor nor essential interests, and arising from a difference of opinion on points of fact, the signatory Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 10

International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint assessors, the inquiry convention determines the mode of their selection and the extent of their powers.

[1005]

ARTICLE 11

If the inquiry convention has not determined where the commission is to sit, it shall sit at The Hague.

The place of sitting, once fixed, cannot be altered by the commission except with the assent of the parties.

If the inquiry convention has not determined the languages to be employed, the question is decided by the commission.

ARTICLE 12

Unless otherwise stipulated, commissions of inquiry are formed in the manner determined by Articles 45 and 57 of the present Convention.

ARTICLE 13

In case of the death, retirement or disability from any cause of one of the commissioners or one of the assessors, should there be any, his place is filled in the same way as he was appointed.

ARTICLE 14

The parties are entitled to appoint special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission.

ARTICLE 15

The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the signatory Powers for the use of the commission of inquiry.

ARTICLE 16

If the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry.

It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the custody of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

ARTICLE 17

In order to facilitate the constitution and working of international commissions of inquiry, the signatory Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

ARTICLE 18

The commission shall settle the details of the procedure not covered by the special inquiry convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence.

[1006] ARTICLE 19

On the inquiry both sides must be heard.

At the dates fixed, each party communicates to the commission and to the other party the statements of facts, if any, and, in all cases, the instruments,

papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

ARTICLE 20

The commission is entitled, with the assent of the parties in dispute, and with the permission of the State in which the territory in dispute is located, to move temporarily to this territory, if it is not already there, or to send thither one or more of its members.

ARTICLE 21

Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 22

The commission is entitled to ask either party for such explanations and information as it deems expedient.

ARTICLE 23

The Powers in litigation undertake to supply the international commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with and to accurately understand the facts in question.

They undertake to make use of the means at their disposal under their municipal law, to ensure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties shall arrange for their evidence to be taken before the qualified officials of their own country.

ARTICLE 24

For all notifications which the commission has to make in the territory of a third Power signatory to this Convention, the commission shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests cannot be refused unless the Power in question considers them of a nature to impair its sovereign rights or its safety.

The commission will also be always entitled to act through the Power in whose territory it sits.

ARTICLE 25

The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and their counsel, and in the order fixed by the commission.

[1007] ARTICLE 26

The examination of witnesses is conducted by the president.

The members of the commission may, however, put to the witness the

questions that they consider proper in order to throw light on or complete his evidence, or in order to inform themselves on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

ARTICLE 27

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

ARTICLE 28

A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks well, which shall be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is required to sign it.

ARTICLE 29

The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

ARTICLE 30

The commission considers its decisions in private and the proceedings remain secret.

All questions are decided by a majority of the members of the commission.

If a member declines to vote, the fact must be recorded in the minutes.

ARTICLE 31

The sittings of the commission are not public, nor are the minutes and documents connected with the inquiry published, except in virtue of a decision of the commission taken with the consent of the parties.

ARTICLE 32

After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

ARTICLE 33

The report of the international commission of inquiry is adopted by a majority vote and signed by all of the members of the commission.

If one of the members refuses to sign, the fact is mentioned; the validity of the report adopted by a majority vote not being affected.

[1008] ARTICLE 34

The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is delivered to each party.

ARTICLE 35

The report of the commission is limited to a finding of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to this finding.

ARTICLE 36

Each party pays its own expenses and an equal share of the expenses of the commission.

PART IV.—INTERNATIONAL ARBITRATION

CHAPTER I.—*The system of arbitration*

ARTICLE 37

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

ARTICLE 38

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the signatory Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.

ARTICLE 39

The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

ARTICLE 40

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present act or afterwards, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

[1009] CHAPTER II.—*The Permanent Court of Arbitration*

ARTICLE 41

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 42

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 43

The Permanent Court has its seat at The Hague.

An International Bureau serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The signatory Powers undertake to communicate to the Bureau, as soon as possible, a duly certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents, eventually showing the execution of the awards given by the Court.

ARTICLE 44

Within the three months following its ratification of the present act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

The persons thus selected shall be inscribed as members of the Court, in a list which shall be notified to all the signatory Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the signatory Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place is filled in the same way as he was appointed, and for a fresh period of six years.

ARTICLE 45

When the signatory Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

[1010] Failing the composition of the arbitration tribunal by agreement of the parties, the following course shall be pursued:

Each party appoints two arbitrators, of whom one only can be its *ressortissant* or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different

Power, and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the litigant parties and not *ressortissants* of either of them. Which of the candidates thus presented shall be umpire is determined by lot.

ARTICLE 46

The tribunal being composed as provided in the preceding article, the parties notify to the International Bureau as soon as possible their determination to have recourse to the Court, the text of their *compromis,* and the names of the arbitrators.

The Bureau communicates without delay to each arbitrator the *compromis,* and the names of the other members of the tribunal.

The tribunal assembles on the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the tribunal, in the performance of their duties, and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 47

The International Bureau is authorized to place its premises and staff at the disposal of the signatory Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-signatory Powers or between signatory Powers and non-signatory Powers, if the parties are agreed to have recourse to this tribunal.

ARTICLE 48

The signatory Powers consider it their duty if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

In case of dispute between two Powers, one of them may always address to the International Bureau at The Hague a note containing a declaration that it would be ready to submit the dispute to arbitration.

The International Bureau must at once inform the other Power of the declaration.

ARTICLE 49

A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the
[1011] Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of procedure and all other necessary regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the signatory Powers without delay the regulations adopted by it. It shall present to them an annual report on the labors of the Court, the working of the administration, and the expenditure. The report likewise shall contain a *résumé* of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 43, paragraphs 5 and 6.

Article 50

The expenses of the Bureau shall be borne by the signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date of their adhesion.

Chapter III.—*Arbitration procedure*

Article 51

With a view to encouraging the development of arbitration, the signatory Powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

Article 52

The Powers which have recourse to arbitration sign a special act (*compromis*), in which are defined the subject of the dispute, the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 63 of the present Convention must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The *compromis* shall likewise define, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

Article 53

The Permanent Court is competent to settle the *compromis,* if the parties have agreed to have recourse to it for the purpose.

[1012] It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question;

2. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 54

In the cases contemplated in the preceding article, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 45, paragraphs 3-6.

The fifth member is *ex officio* president of the commission.

ARTICLE 55

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present act.

Failing the composition of the tribunal by agreement of the parties, the course referred to in Article 45, paragraphs 3–6, is pursued.

ARTICLE 56

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 57

The umpire is *ex officio* president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 58

When the *compromis* is settled by a commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

ARTICLE 59

In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed.

ARTICLE 60

The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third Power with the latter's consent.

[1013] The place of meeting once fixed, cannot be altered by the tribunal, without the assent of the parties.

ARTICLE 61

If the question as to what languages are to be used has not been settled by the *compromis,* it shall be decided by the tribunal.

ARTICLE 62

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defense of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 63

As a general rule, arbitration procedure comprises two distinct phases: written pleadings and oral discussions.

The written pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the *compromis.*

The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

ARTICLE 64

Every document produced by one party must be communicated to the other party in the form of a duly certified copy.

ARTICLE 65

Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

ARTICLE 66

The discussions are under the direction of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes are signed by the president and by one of the secretaries and alone have an authentic character.

ARTICLE 67

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

[1014]

ARTICLE 68

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the Parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 69

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

ARTICLE 70

The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 71

They are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

ARTICLE 72

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ARTICLE 73

The tribunal is authorized to declare its competence in interpreting the *compromis*, as well as the other treaties which may be invoked in the case, and in applying the principles of law.

ARTICLE 74

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its final arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 75

The litigant Powers undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute.

ARTICLE 76

For all notifications which the tribunal has to make in the territory of a third Power, signatory of the present Convention, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

These requests shall not be rejected unless the Power addressed considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

[1015] ARTICLE 77

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president declares the discussion closed.

ARTICLE 78

The deliberations of the tribunal take place in private and remain secret.

All questions are decided by a majority of its members.

ARTICLE 79

The award rendered by a majority vote must state the reasons on which it is based. It contains the names of the arbitrators; it is signed by the president and by the registrar or the secretary acting as registrar.

ARTICLE 80

The arbitral award is read out at a public sitting, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE 81

The arbitral award, duly pronounced and notified to the agents of the litigant parties, settles the dispute definitively and without appeal.

ARTICLE 82

Any dispute arising between the parties as to the interpretation and execution of the arbitral award shall, so far as the *compromis* does not prevent it, be submitted to the decision of the tribunal which pronounced it.

ARTICLE 83

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case and unless there be a stipulation to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.

ARTICLE 84

The award is binding only on the parties in dispute.

When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 85

Each party pays its own expenses and an equal share of the expenses of the tribunal.

[1016] CHAPTER IV.—*Arbitration by summary procedure*

ARTICLE 86

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the signatory Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 87

Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Court (Article 44), exclusive of the members designated by either of the parties and not being *ressortissants* of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decisions by a majority of votes.

ARTICLE 88

In the absence of any previous agreement, the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ARTICLE 89

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government which appointed him.

ARTICLE 90

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts be called. The tribunal has, on its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

GENERAL PROVISIONS

ARTICLE 91

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification,

and a duly certified copy shall be sent, through the diplomatic channel, to all the Powers which were represented at the International Peace Conference at The Hague.

ARTICLE 92

Non-signatory Powers which have been represented at the International Peace Conference may adhere to the present Convention. For this purpose they must make known their adhesion to the contracting Powers by a written notification addressed to the Netherland Government, and by it communicated to all the other contracting Powers.

[1017]

ARTICLE 93

The conditions on which the Powers which have not been represented at the International Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 94

In the event of one of the high contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other contracting Powers.

This denunciation shall have effect only in regard to the notifying Power.

In faith of which the plenipotentiaries have signed the present Convention and have affixed their seals thereto.

Done at The Hague, ... in a single original, which shall remain deposited in the archives of the Netherland Government, and copies of which, duly certified, shall be sent through the diplomatic channel to the contracting Powers.

[1018]

Annex 71

DRAFT CONVENTION

CONCERNING THE LIMITATION OF THE EMPLOYMENT OF FORCE FOR THE RECOVERY OF ORDINARY PUBLIC DEBTS HAVING THEIR ORIGIN IN CONTRACTS

In order to prevent armed conflicts between nations, of a purely pecuniary origin growing out of contract debts claimed from the Government of one country by the Government of another country as due to its nationals, the signatory Powers agree not to resort to armed force for the collection of such contract debts.

This stipulation, however, shall not apply when the debtor State rejects or ignores a proposal of arbitration, or, in case of acceptance, makes it impossible to establish the *compromis*, or, after arbitration, fails to comply with the award.

It is further agreed that the arbitration here considered shall conform to the procedure provided by Chapter III of the Convention for the pacific settlement of international disputes adopted at The Hague, and that it will determine, in so

far as the parties should not have agreed thereupon, the validity and the amount of the debt and the time and mode of settlement.

Annex 72

PLAN FOR OBLIGATORY ARBITRATION

VOTED BY THE COMMITTEE OF EXAMINATION

(*Anglo-American project*)

ARTICLE 16 *a*

Differences of a legal nature, and especially those relating to the interpretation of treaties existing between two or more of the contracting States, which may in future arise between them and which it may not have been possible to settle by diplomacy, shall be submitted to arbitration, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the dispute.

[1019]

ARTICLE 16 *b*

Each signatory Power shall be the judge of whether the difference which arises affects its vital interests, its independence, or its honor, and, consequently, is of such a nature as to be comprised among those which are excepted from obligatory arbitration, as provided in the preceding article.

ARTICLE 16 *c*

The high contracting Parties recognize that certain of the differences referred to in Article 16 are by nature subject to arbitration without the reservations mentioned in Article 16 *a*.

ARTICLE 16 *d*

In this class of questions they agree to submit to arbitration without reserve the following differences:

I. Disputes concerning the interpretation and application of conventional stipulations relating to the following matters:

a. .....
b. .....
c. .....
d. .....

etc., etc., etc.

II. .....
III. .....

ARTICE 16 *e*

The high contracting Parties have decided, moreover, to annex to the present Convention a protocol enumerating:

1. Such other matters as appear to them at the present time to admit of embodiment in a stipulation respecting arbitration without reserve.

2. The Powers which now contract this engagement with each other with respect to such matters in whole or in part, on condition of reciprocity.

The protocol shall likewise fix the conditions under which other matters may be added, which may be recognized in the future as admitting of embodiment in stipulations respecting arbitration without reserve, as well as the conditions under which non-signatory Powers shall be permitted to adhere to the present agreement.

[1020] ARTICLE 16 *f*

It is understood that arbitral awards, in so far as they relate to questions coming within the jurisdiction of national courts, shall have merely an interpretative force, with no retroactive effect on prior decisions.

ARTICLE 16 *g*

It is understood that stipulations contemplating arbitration, which appear in treaties already concluded or to be concluded, shall remain in force.

ARTICLE 16 *h*

If all the States signatory to one of the Conventions mentioned in Articles 16 *c* and 16 *d* are parties to a suit concerning the interpretation of the Convention, the arbitral award shall have the same force as the Convention itself and must be equally well observed.

If, on the contrary, the dispute arises between only a few of the signatory States, the parties in dispute must notify the signatory Powers a reasonable time in advance, and the latter Powers have the right to intervene in the case.

The arbitral award shall be communicated to the signatory States which have not taken part in the case. If the latter unanimously declare that they accept the interpretation of the point at issue adopted by the arbitral award, that interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the award shall be binding only upon the Powers in dispute, or upon such Powers as have formally accepted the decision of the arbitrators.

ARTICLE 16 *i*

The procedure to be followed in adhering to the principle established by the arbitral award, as provided in paragraph 3 of the preceding article, shall be as follows:

If a convention establishing a union with a special office is involved, the parties taking part in the case shall transmit the text of the award to the special office through the State in whose territory the office is located. The office shall draw up the text of the article of the Convention to accord with the arbitral award, and forward it through the same channel to the signatory Powers that have not taken part in the case. If the latter unanimously accept the text of the article, the office shall make known their acceptance by means of a protocol, a true copy of which shall be transmitted to all the signatory States.

States whose reply has not reached the office within one year from the date on which the office forwarded the text of the article, shall be considered as having accepted it.

If a convention establishing a union with a special office is not involved, the said functions of the special office shall be performed by the International Bureau of The Hague through the Netherland Government.

It is understood that the present stipulation in no way affects arbitration clauses which are already contained in existing treaties.

[1021]

ARTICLE 16 *k*

In each particular case the signatory Power shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure, and the periods to be observed in the matter of the constitution of the arbitral tribunal.

ARTICLE 16 *l*

The stipulations of Article 16 *d* cannot be invoked in any case where the interpretation or application of extraterritorial rights is involved.

ARTICLE 16 *m*

The present Convention shall be ratified with the least possible delay.

The ratifications shall be deposited at The Hague.

The ratification of each signatory Power shall specify the cases enumerated in Article 16 *d*, in which the ratifying Power shall not take advantage of the provisions of Article 16 *a*.

A *procès-verbal* shall be drawn up for each ratification, a certified copy of which shall be transmitted through the diplomatic channel to all the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications, including additional cases contained in Article 16 *d*.

ARTICLE 16 *n*

Each of the signatory Powers shall have the right to denounce the Convention. This denunciation may be made in such a way as to involve the entire withdrawal of the denouncing Power from the Convention, or as to have effect only with respect to a Power designated by the denouncing Power.

This denunciation may likewise be made with respect to one or more of the cases enumerated in Article 16 *d* or in the Protocol contemplated by Article 16 *e*.

Such portions of the Convention as have not been denounced shall continue to remain in force.

The denunciation, whether total or partial, shall not take effect until six months after written notice has been given to the Netherland Government, and immediately communicated by the latter to all the other contracting Powers.

[1022]

Annex 73

PLAN FOR OBLIGATORY ARBITRATION

(*Anglo-American project*)

ARTICLE 16 *a*

Differences of a legal nature, and especially those relating to the interpretation of treaties existing between two or more of the contracting States, which

may in future arise between them, and which it may not have been possible to settle by diplomacy, shall be submitted to arbitration, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of any of the said States, and do not concern the interests of other States not involved in the disputes.

ARTICLE 16 *b*

Each signatory Power shall be the judge of whether the difference which arises affects its vital interests, its independence, or its honor, and, consequently, is of such a nature as to be comprised among those which are excepted from obligatory arbitration, as provided in the preceding article.

ARTICLE 16 *c*

The high contracting Parties recognize that certain of the differences referred to in Article 16 are by nature subject to arbitration without the reservations mentioned in Article 16 *a*.

ARTICLE 16 *d*

In this class of questions they agree to submit to arbitration without reserve the following differences:

I. Disputes concerning the interpretation and application of conventional stipulations relating to the following subjects:

1. Reciprocal free aid to the indigent sick.
2. International protection of workmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of ships.
6. Wages and estates of deceased seamen.
7. Protection of literary and artistic works.

II. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties.

ARTICLE 16 *e*

The high contracting Parties have decided, moreover, to annex to the present Convention a protocol enumerating:

1. Such other matters as appear to them at the present time to admit of embodiment in a stipulation respecting arbitration without reserve;

[1023] 2. The Powers, which at present contract this engagement with each other with respect to such matters, in whole or in part, on condition of reciprocity.

The protocol shall likewise fix the conditions under which other matters may be added, which may be recognized in future as admitting of embodiment in stipulations respecting arbitration without reserve, as well as the conditions under which non-signatory Powers shall be permitted to adhere to the present agreement.

ARTICLE 16 *f*

If all the States signatory to one of the conventions mentioned in Article 16 *c* and 16 *d* are parties to a suit concerning the interpretation of the Convention, the arbitral award shall have the same force as the Convention itself and must be equally well observed.

If, on the contrary, the dispute arises between only a few of the signatory

States, the parties in dispute must notify the signatory Powers a reasonable time in advance, and the latter Powers have the right to intervene in the case.

The arbitral award shall be communicated to the signatory States which have not taken part in the case. If the latter unanimously declare that they accept the interpretation of the point at issue adopted by the arbitral award, that interpretation shall be binding upon all and shall have the same force as the Convention itself. In the contrary case, the award shall be binding only upon the Powers in dispute, or upon such Powers as have formally accepted the decision of the arbitrators.

ARTICLE 16 *g*

The procedure to be followed in adhering to the principle established by the arbitral award, as provided in paragraph 3 of the preceding article, shall be as follows:

If a convention establishing a union with a special office is involved, the parties taking part in the case shall transmit the text of the award to the special office through the State in whose territory the office is located. The office shall draw up the text of the article of the convention to accord with the arbitral award, and forward it through the same channel to the signatory Powers that have not taken part in the case. If the latter unanimously accept the text of the article, the office shall make known their acceptance by means of a protocol, a true copy of which shall be transmitted to all the signatory States.

If a convention establishing a union with a special office is not involved, the said functions of the special office shall be performed by the International Bureau at The Hague through the Netherland Government.

It is understood that the present stipulation in no way affects arbitration clauses which are already in existing treaties.

ARTICLE 16 *h*

In each particular case the signatory Powers shall conclude a special act (*compromis*) conformably to the respective constitutions or laws of the signatory Powers, defining clearly the subject of the dispute, the extent of the arbitrators' powers, the procedure, and the periods to be observed in the matter of the constitution of the arbitral tribunal.

ARTICLE 16 *i*

It is understood that stipulations contemplating arbitration, which appear in treaties already concluded or to be concluded, shall remain in force.

[1024] ARTICLE 16 *k*

The present Convention shall be ratified with the least possible delay.

The ratifications shall be deposited at The Hague.

The ratification of each signatory Power shall specify the cases enumerated in Article 16 *d*, in which the ratifying Power shall not take advantage of the provisions of Article 16 *a*.

A *procès-verbal* shall be drawn up for each ratification, a certified copy of which shall be transmitted through the diplomatic channel to all the Powers which were represented at the International Peace Conference at The Hague.

A signatory Power may at any time deposit new ratifications, including additional cases contained in Article 16 *d*.

ARTICLE 16 *l*

Each of the signatory Powers shall have the right to denounce the Convention. This denunciation may be made in such a way as to involve the entire withdrawal of the denouncing Power from the Convention, or as to have effect only with respect to a Power designated by the denouncing Power.

This denunciation may likewise be made with respect to one or more of the cases enumerated in Article 16 *d* or in the protocol contemplated by Article 16 *e*.

Such portions of the Convention as have not been denounced shall continue to remain in force.

The denunciation, whether total or partial, shall not take effect until six months after written notice has been given to the Netherland Government, and immediately communicated by the latter to all the other contracting Powers.

[1025] PROTOCOL

Provided for by Article 16 e *of the British proposition relating to obligatory arbitration*

ARTICLE 1

Each Power signatory to the present protocol accepts arbitration without reserve in controversies concerning the interpretation and application of conventional stipulations relating to such of the matters enumerated in the table hereto annexed as are indicated by the letter A in the column bearing its name. It declares that it contracts this engagement with each of the other signatory Powers whose reciprocity in this respect is indicated in the same manner in the table.

ARTICLE 2

Each Power shall, however, have the right to notify its acceptance of matters enumerated in the table with respect to which it may not already have accepted arbitration without reserve in the terms of the preceding article. For this purpose it shall address itself to the Netherland Government, which shall notify this acceptance to the International Bureau at The Hague. After having made proper notation in the table contemplated by the preceding article, the International Bureau shall immediately forward true copies of the notification and of the table thus completed to the Governments of the signatory Powers.

ARTICLE 3

Moreover, two or more signatory Powers, acting in concert, may address themselves to the Netherland Government and request it to insert in the table additional matters with respect to which they are ready to accept arbitration without reserve in the terms of Article 1.

These additional matters shall be inserted in the table and the notification, as well as the corrected text of the table, shall be transmitted to the signatory Powers in the manner prescribed by the preceding article.

ARTICLE 4

Non-signatory Powers are permitted to adhere to the present protocol by notifying the Netherland Government of the matters in the table, with respect to which they are ready to accept arbitration without reserve in the terms of Article 1.

[1026-1028]

MODEL OF TABLE TO BE ANNEXED TO THE PROTOCOL OF THE BRITISH PROPOSITION

	Germany	*United States of America*	*Argentine Republic*	*Austria-Hungary*	*Belgium*	*Bolivia*	*Brazil*	*Bulgaria*	*Chile*	*China*	*Colombia*	*Costa Rica*	*Cuba*	*Denmark*	*Dominican Republic*	*Ecuador*	*Spain*	*France*	*Great Britain*	*Greece*	*Guatemala*	*Haiti*	*Honduras*	*Italy*	*Japan*	*Luxemburg*	*Mexico*	*Montenegro*	*Nicaragua*	*Norway*	*Etc.*
1. Pecuniary claims for damages, when the principle of indemnity is recognized by the parties....																															
2. Reciprocal free aid to the indigent sick																															
3. International protection of workmen																															
4. Means of preventing collisions at sea																															
5. Weights and measures ..																															
6. Measurement of vessels..																															
7. Wages and estates of deceased seamen																															
8. Protection of literary and artistic works																															
9. Regulation of commercial and industrial companies																															
10. Pecuniary claims arising from acts of war, civil war, arrest of foreigners, or seizure of their property																															
11. Sanitary regulations																															
12. Equality of foreigners and nationals as to taxes and imposts																															
13. Customs tariffs																															
14. Regulations concerning epizooty, phylloxera, and other similar pestilences																															
15. Monetary systems																															
16. Rights of foreigners to acquire and hold property																															
17. Civil and commercial procedure																															
18. Pecuniary claims involving the interpretation or application of conventions of every kind between the parties in dispute																															
19. Repatriation conventions..																															
20. Postal telegraph and telephone conventions																															
21. Taxes against vessels, dock charges, lighthouse and pilot dues, salvage charges and taxes imposed in case of damage or shipwreck																															
22. Private international law...																															

[1029]

Annex 74

DRAFT DECLARATION CONCERNING OBLIGATORY ARBITRATION

The Conference,

Actuated by the spirit of mutual agreement and concession characterizing its deliberations,

Agrees upon the following declaration, which, while reserving to each of the States represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted:

It is unanimous,

1. In admitting the principle of obligatory arbitration;
2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without any restriction.

Finally, it is unanimous in proclaiming that, although it has not yet been found feasible to conclude a Convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the collected States not only have learned to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity.

[1030]

PROPOSALS RELATIVE TO THE PERMANENT COURT OF ARBITRATION

Annex 75

PROPOSAL OF THE RUSSIAN DELEGATION

PART IV.—International Arbitration

Chapter II.—*The permanent court of arbitration*

Article 24

The members of the Permanent Court of Arbitration meet once every year at The Hague in full session.

These meetings are competent:

1. To select by secret ballot three members from the list of arbitrators who, during the following year, must be ready at any time to constitute immediately the permanent tribunal of arbitration.

2. To consider the annual report of the Administrative Council and of the International Bureau.

3. To express the opinion of the Permanent Court of Arbitration upon the questions which have arisen during the course of the procedure of an arbitration court as well as on the acts of the Administrative Council and the International Bureau.

4. To exchange ideas on the progress of international arbitration in general.

The same members of the permanent tribunal of arbitration may be re-elected in the above-mentioned meeting of the members of the Permanent Court of Arbitration for a further year of service.

Article 25

In case the Powers in dispute consent to leave their difference to arbitration, they address the International Bureau requesting the immediate convocation of the members of the permanent tribunal of arbitration.

The two parties are free each to add one member, specially designated, to the body of the permanent tribunal of arbitration.

Article 26

In the absence of the convocation of the permanent tribunal of arbitration the parties in dispute may proceed in the following manner for the constitution of a special arbitration tribunal:

[1031] Each party names two arbitrators, and these together choose an umpire.

In case the votes are equal, the choice of the umpire is entrusted to a third Power designated by the parties by common agreement.

If agreement is not reached on this subject, each party designates a different Power and the choice of the umpire is made in concert by the Powers thus designated.

The tribunal being thus composed the parties notify the International Bureau of their decision to constitute a special arbitration tribunal and the names of the arbitrators.

ARTICLE 27

The permanent tribunal of arbitration meets on the date fixed by the parties.

The members of the Permanent Court of Arbitration, in the exercise of their functions and outside of their own Governments, enjoy diplomatic privileges and immunities.

(Then follow Articles 25 *et seq.* of the arbitration Convention of 1899.)

Annex 76

PROPOSITION OF THE DELEGATION OF THE UNITED STATES OF AMERICA

In conformity with the instructions of its Government the delegation of the United States of America has the honor to submit the following proposition, with a view to facilitate the immediate reference to judicial determination of international differences that cannot be settled through the diplomatic channel, for the organization of a Permanent Court of Arbitration accessible at all times and, in the absence of contrary stipulation of the parties, performing its functions in conformity with the rules of procedure set forth in the Convention of 1899 or adopted by this Conference.

Although our delegation does not deem it expedient to formulate in detail the organization, jurisdiction or procedure of this tribunal, the delegation is ready to submit at the proper time some suggestions concerning the details of this proposition calculated to assist the special committee in its consideration of the question. However, in view of the importance and aim of the question, the delegation of the United States of America respectfully suggests that it would be appropriate for the president of the First Commission to designate a special committee of not more than nine members, to which shall be submitted the proposition presented and the others of like nature as well as those dealing with the diverse details of the proposition; the special committee after mature deliberation should make a report of its views and recommendations to the first subcommission of the First Commission.

DRAFT

I

A Permanent Court of Arbitration shall be organized, to consist of fifteen judges of the highest moral standing and of recognized competency in questions of international law. They and their successors shall be appointed in the [1032] manner to be determined by this Conference, but they shall be so chosen from the different countries that the various systems of law and pro-

cedure and the principal languages shall be suitably represented in the personnel of the Court. They shall be appointed for . . . years, or until their successors have been appointed and have accepted.

II

The Permanent Court shall convene annually at The Hague on a specified date and shall remain in session as long as necessary. It shall elect its own officers and, saving the stipulations of the Convention, it shall draw up its own regulations. Every decision shall be reached by a majority, and nine members shall constitute a quorum. The judges shall be equal in rank, shall enjoy diplomatic immunity, and shall receive a salary sufficient to enable them to devote their time to the consideration of the matters brought before them.

III

In no case (unless the parties expressly consent thereto) shall a judge take part in the consideration or decision of any case before the Court when his nation is a party therein.

IV

The Permanent Court shall be competent to take cognizance and determine all cases involving differences of an international character between sovereign nations, which it has been impossible to settle through diplomatic channels and which have been submitted to it by agreement between the parties, either originally or for review or revision, or in order to determine the relative rights, duties, or obligations in accordance with the finding, decisions, or awards of commissions of inquiry and specially constituted tribunals of arbitration.

V

The judges of the Permanent Court shall be competent to act as judges in any commission of inquiry or special tribunal of arbitration which may be constituted by any Power for the consideration of any matter which may be specially referred to it and which must be determined by it.

VI

The present Permanent Court of Arbitration might, as far as possible, constitute the basis of the Court, care being taken that the Powers which recently signed the Convention of 1899 are represented in it.

[1033]

Annex 77

PROPOSAL OF THE BULGARIAN DELEGATION

Amendments to the Proposal of the United States of America

I

Article 1

A Permanent Court of Arbitration shall sit at The Hague. It shall be composed of fifteen judges, of which a third shall be renewed every third year, beginning from the date of its composition.

The first as well as the second renewal of judges shall be effected by lot, and subsequent renewals at the expiration of nine years from the date of their election or re-election.

The judges whose names are drawn by lot, or whose appointments for nine years have expired, shall always be eligible for re-election.

The elections of judges shall take place in the following manner:

Each of the States signatory to the present Convention shall designate one person at least of recognized competence in questions of international law and enjoying the highest moral reputation; the persons thus designated shall meet at The Hague and choose from among themselves the required number of judges for the composition or completion of the Court, each State having the right to but a single voice in the vote.

The time of the first meeting of the electors who shall choose the first fifteen judges shall be determined and communicated to the signatory States by the International Bureau.

The convocations of electors to fill the places of a third of the judges, or to renew their appointments, as well as to make up their number to fifteen in case there are vacant places in consequence of death or other causes, shall be made every three years by the same Bureau.

. . . . . .

II

Article 3

Each of the parties in dispute has the right to challenge:

(*a*) The judge of the nationality of the adverse party;

(*b*) The judge who has previously expressed a personal opinion on the matter in dispute unfavorable to this party;

. . . . . .

Any judge would have the right to withdraw from a case when he sees in one way or another that his participation would weaken the confidence due to judicial authority.

[1034]

Annex 78

PROPOSAL OF THE HAITIAN DELEGATION

Amendments to the proposals of the United States of America and Russia

1

When accepting his appointment every member of the Permanent Court of Arbitration shall take an oath to discharge his duties fearlessly and with perfect impartiality; he shall engage moreover neither to solicit nor to accept, so long as he is in office, any declaration or any recompense from a Government other than his own.

2

A general list shall be prepared of all the persons designated by the several signatory Powers.

Such of these persons as shall have been delegated for that purpose by their respective Governments shall meet in general assembly and proceed to the election from the general list of members of the Permanent Court.

The Permanent Court thus composed shall be renewed by thirds and shall itself choose the members who are to supersede those whose appointments expire.

3

The members of the permanent commission are charged with preparing or causing to be prepared under their high control a codification of the principal rules of public and private international law.

Annex 79

PROPOSAL OF THE DELEGATION OF ROUMANIA

The delegation of Roumania has the honor to present the following motion:

In the case of the institution of a Permanent Court of Arbitration in conformity with the proposal of the United States of America,—a proposal upon which the Roumanian delegation is not yet able to express its opinion, since the question described by Dr. Scott as *main* for the composition of this Permanent Court was not sufficiently elucidated—it would be necessary *to insert in the new stipulations relative to this Permanent Court a special article establishing the purely voluntary character of this institution.*

There then would be occasion to declare expressly that "no Power may be constrained to come before this Permanent Court," and that each of them, if it so desired, could always resort to the selection of arbitrators and to the constitution of the Arbitral Tribunal conformably with Chapter II of the Convention of 1899 at present in force. (Address of his Excellency Mr. Choate, ninth meeting of the First Commission, first subcommission.)

[1035]

PROPOSALS RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL HIGH COURT OF JUSTICE

Annex 80

DRAFT OF A CONVENTION PRESENTED BY THE DELEGATIONS OF GERMANY, THE UNITED STATES OF AMERICA, AND GREAT BRITAIN [1]

PART I.—*Constitution of the International High Court of Justice*

ARTICLE 1

With a view to promoting the cause of arbitration the signatory Powers agree to constitute, alongside of the Permanent Court of Arbitration, an International High Court of Justice, of easy and gratuitous access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

ARTICLE 2

The International High Court of Justice is composed of judges and deputy judges all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court shall be named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present Convention.

ARTICLE 3

The judges and deputy judges are appointed for a period of . . . years, counting from the date on which the appointment is notified to the administrative council of the Permanent Court of Arbitration. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of . . . years.

ARTICLE 4

The judges of the International High Court of Justice are equal, and rank according to the date on which their appointment was notified (Article 3, [1036] paragraph 1), and, if they sit by rota (Article 5, paragraph 3), according

[1] See also annexes 84, 85 and 86.

to the date on which they entered upon their duties. The judge who is senior in point of age takes precedence when the date of notification is the same.

They enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before entering upon their duties, the judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and upon their conscience.

ARTICLE 5

The Court is composed of seventeen judges; nine judges constitute a quorum.

The judges appointed by the following signatory Powers: . . . are always summoned to sit.

The judges and deputy judges appointed by the other Powers shall sit by rota as shown in the table hereto annexed.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 6

The High Court shall annually nominate three judges, who shall form a special committee during the year, and three more to replace them should the necessity arise.

Only judges who are called upon to sit can be appointed to these duties. A member of the committee cannot exercise his duties when the Power which appointed him is one of the parties.

The members of the committee shall conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 7

Proposition of the delegations of the United States of America and Great Britain

In no case, unless with the express consent of the parties in dispute, can a judge participate in the examination or discussion of a case pending before the International High Court of Justice when the Power which has appointed him is one of the parties.

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the High Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act there in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

[1037] ARTICLE 9

The judges of the International High Court of Justice shall receive during the years when they are called upon to sit an annual salary of . . . Netherland

florins. This salary shall be paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

While the Court is sitting, or while they are carrying out the duties conferred upon them by this Convention, they shall be entitled to receive a monthly sum of . . . florins; they shall further receive a traveling allowance fixed in accordance with regulations existing in their own country.

The emoluments indicated above shall be paid through the International Bureau and borne by the signatory Powers in the proportion established for the Bureau of the Universal Postal Union.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the International High Court of Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The special committee (Article 6) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council is charged, with regard to the International High Court of Justice, with the same functions that it fulfills under the Convention of July 29, 1899, as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau of the Permanent Court of Arbitration acts as registry to the International High Court of Justice. It has charge of the archives and carries out the administrative work.

ARTICLE 14

The High Court shall meet in session once and, if necessary, twice a year. The sessions shall open the third Wednesday in July and the third Wednesday in January, and shall last until all the business on the agenda has been transacted.

The sessions shall not take place if the special committee decides that business does not require it.

ARTICLE 15

(Provisions respecting the relations of the International High Court of Justice with the International Prize Court, especially as regards holding office as judge in both Courts.)

[1038] PART II.—*Competency and procedure*

ARTICLE 16

The International High Court of Justice shall be competent:

1. To deal with all cases of arbitration which, by virtue of a general treaty

concluded before the ratification of this Convention, would be submitted to the Permanent Court of Arbitration unless one of the parties objects thereto.

2. To deal with all cases of arbitration which, in virtue of a general treaty or special agreement, are submitted to it.

Proposal of the delegations of Germany and the United States of America

3. To revise awards of tribunals of arbitration and reports of commissions of inquiry, as well as to fix the rights and duties flowing therefrom, in all cases where, in virtue of a general treaty or special agreement, the parties address the High Court for this purpose.

ARTICLE 17

The special committee (Article 6) shall be competent:

1. To decide the arbitrations referred to in paragraphs 1 and 2 of the preceding article, if the parties concerned are agreed in seeking summary procedure and judgment.

2. To discharge the duties assigned to commissions of inquiry by the Convention of July 29, 1899, so far as the High Court shall have been entrusted with such inquiry by the parties in dispute acting in common agreement.

ARTICLE 18

The special committee is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic understanding in the case of:

1. A dispute arising from contract debts claimed as due to the *ressortissants* of one country by the Government of another country, and for the settlement of which an offer of arbitration has been accepted.

Proposal of the German delegation

2. A dispute covered by a general treaty of arbitration providing for a *compromis* in all disputes and containing no stipulation to the contrary. Recourse cannot, however, be had to the High Court if the Government of the other country declares that in its opinion the dispute does not come within the category of questions to be submitted to compulsory arbitration.

ARTICLE 19

The parties concerned may each nominate a judge of the High Court to take part, with power to vote, in the examination of the case which they have submitted to the committee. If the committee acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the High Court.

[1039] ARTICLE 20

The International High Court of Justice shall follow the rules of procedure set forth in Part IV, Chapter 3, of the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 21

All decisions of the High Court shall be arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 22

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

ARTICLE 23

The High Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

Within a year from the ratification of the present Convention it shall meet in order to elaborate these rules.

ARTICLE 24

The High Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

PART III.—*Final provisions*

ARTICLE 25

The present Convention shall be ratified as soon as possible.

The ratification shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 26

The Convention shall come into force six months after its ratification.

It shall remain in force for . . . years, and shall be tacitly renewed for . . . years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

[1040-1041]

Annex 81

SUGGESTIONS OFFERED BY THE GERMAN, AMERICAN, AND BRITISH DELEGATIONS RESPECTING THE COMPOSITION OF AN INTERNATIONAL COURT OF JUSTICE

Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Twelve Years

	Judges	*Deputy Judges*	*Judges*	*Deputy Judges*
	First Year		*Fifth Year*	
1	Argentine Republic		Dominican Republic	
2	Belgium		Ecuador	
3	Bolivia		Spain	
4	China		Mexico	
5	Spain		Norway	
6	Netherlands		Netherlands	
7	Roumania		Serbia	
8	Sweden		Switzerland	
9	Turkey		Turkey	
	Second Year		*Sixth Year*	
1	Argentine Republic		Bulgaria	
2	Belgium		Spain	
3	China		Guatemala	
4	Colombia		Haiti	
5	Spain		Luxemburg	
6	Netherlands		Mexico	
7	Roumania		Norway	
8	Sweden		Persia	
9	Turkey		Switzerland	
	Third Year		*Seventh Year*	
1	Brazil		Argentine Republic	
2	Chile		Belgium	
3	Costa Rica		China	
4	Denmark		Spain	
5	Spain		Honduras	
6	Greece		Netherlands	
7	Netherlands		Roumania	
8	Portugal		Sweden	
9	Turkey		Turkey	
	Fourth Year		*Eighth Year*	
1	Brazil		Argentine Republic	
2	Chile		Belgium	
3	Cuba		China	
4	Denmark		Spain	
5	Greece		Nicaragua	
6	Netherlands		Netherlands	
7	Portugal		Roumania	
8	Siam		Sweden	
9	Turkey		Turkey	

	Judges	Deputy Judges	Judges	Deputy Judges
	Ninth Year		*Eleventh Year*	
1	Brazil		Spain	
2	Chile		Mexico	
3	Denmark		Norway	
4	Spain		Netherlands	
5	Greece		Peru	
6	Panama		Salvador	
7	Netherlands		Serbia	
8	Portugal		Switzerland	
9	Turkey		Turkey	
	Tenth Year		*Twelfth Year*	
1	Brazil		Bulgaria	
2	Chile		Spain	
3	Denmark		Mexico	
4	Greece		Montenegro	
5	Paraguay		Norway	
6	Netherlands		Persia	
7	Portugal		Switzerland	
8	Siam		Uruguay	
9	Turkey		Venezuela	

[1043]

TABLE SHOWING THE NUMBER OF YEARS IN EACH PERIOD OF TWELVE YEARS

Countries	Judges	Deputies	Countries	Judges	Deputies
	Years			*Years*	
Spain	10	10	Bolivia	1	1
Netherlands	10	10	Colombia	1	1
Turkey	10	10	Costa Rica	1	1
Argentine	4	4	Cuba	1	1
Belgium	4	4	Dominican Republic	1	1
Brazil	4	4	Ecuador	1	1
Chile	4	4	Guatemala	1	1
China	4	4	Haiti	1	1
Denmark	4	4	Honduras	1	1
Greece	4	4	Luxemburg	1	1
Mexico	4	4	Montenegro	1	1
Norway	4	4	Nicaragua	1	1
Portugal	4	4	Panama	1	1
Roumania	4	4	Paraguay	1	1
Sweden	4	4	Peru	1	1
Switzerland	4	4	Salvador	1	1
Bulgaria	2	2	Uruguay	1	1
Persia	2	2	Venezuela	1	1
Serbia	2	2			
Siam	2	2			
	90	90		18	18

[1044]

Annex 82

DECLARATION OF THE DELEGATION OF CHINA

Tentative suggestions for use in the discussion of the composition of a Permanent Court

The permanence of an arbitral jurisdiction at The Hague being a real forward step in the way of progress and inspiring us with the pacific spirit which has traditionally animated the Government of Peking, we render honor to the initial highly-humanitarian proposal presented by our very honorable colleagues of the United States of America—a proposal which we are entirely disposed to support warmly and to vote upon.

Nevertheless, we do not dissimulate the difficulties that will be encountered in the constitution of this permanent high court, above all in the distribution of judges among the numerous States here represented.

According to the eloquent statement of Mr. Scott, the number of judges will be sixteen or seventeen, and the population with colonies should be taken as basis of the representation in this court, which should be constituted and sit as a judicial tribunal according to international law and not according to a particular legislation.

With the purpose of removing all inequality in the distribution of the judges in question and to facilitate its constitution, the delegation of China has the honor to suggest to the committee of examination the idea of taking for a basis the following table of the distribution of the expenses of the International Bureau among the participating countries, together with the indication of the unit; thus fixing the classification of the States:

Germany	25	units.
Austria-Hungary	25	"
Belgium	15	"
Bulgaria	5	"
China	25	"
Denmark	10	"
Spain	20	"
United States of America	25	"
United Mexican States	5	"
France	25	"
Great Britain	25	"
Greece	5	"
Italy	25	"
Japan	25	"
Luxemburg	3	"
Montenegro	1	unit.
Norway	10	units.
Netherlands	15	"
Persia	3	"
Portugal	10	"

[1045]	Roumania	15	units.
	Russia	25	"
	Serbia	5	"
	Siam	3	"
	Sweden	15	"
	Switzerland	10	"
		375	units.

It is of course understood that this table remains open to the States not represented at the First Peace Conference and convoked to the Second and who have all recently adhered to the Convention of 1899 for the pacific settlement of international disputes.

In case the *basis of population* indicated in the explanatory statement of Mr. Scott would not be taken into consideration, the delegation of China, despite its ardent desire to associate itself with the American proposal, would be obliged to abstain from voting and would reserve the right to name new arbitrators for the old Permanent Court.

Annex 83

PROPOSAL OF THE DELEGATION OF BRAZIL

Provisional suggestions for use in the discussion of the composition of a permanent court

Considering that to fix at the outset upon an arbitrary number of judges for the Permanent Court of Arbitration, according to a certain idea assumed *a priori* as to the magnitude of this number, in order to attempt to accommodate to it thereafter the representation of all the States, is to reverse the necessary and inevitable terms of the question; considering that this inversion is the less justifiable when the precise number of States to be represented in the Court is known and a different number less than that is adopted for their representation;

Considering that by transposing in this manner the unalterable terms of the problem it is presumed arbitrarily to assign to the different States unequal representations in this international Court;

Considering that in the Convention for the pacific settlement of international disputes celebrated at The Hague, July 29, 1899, the signatory Powers, among which were all those of Europe as well as the United States of America, Mexico, China, and Japan, agreed that the contracting States, without regard to their importance, should all have an equal representation in the Permanent Court of Arbitration;

Considering that in the adoption of this basis they have not only performed a voluntary act but also admitted a principle which it was not possible for them to overlook in the composition of an international body created for the purpose of deciding the differences between independent and sovereign States;

[1046] Considering therefore that this principle, inevitable in every other organization of a like nature, with greater reason imposes itself in a manner especially imperative when the question is that of establishing the definitive insti-

tution in which States place their highest confidence for the judicial settlement of their disputes;

Considering, consequently, that in the projected Court the equality of all the signatory States cannot be passed over, which would be guarded by assigning to each the right to an entire and permanent representation in the body;

Considering that no Government could, even if it wished, renounce this right, which touches the sovereignty and consequently the independence of the States in their mutual relations;

Considering that this principle is not observed by permitting each State to appoint a member for the Court if he is to sit only for a certain number of years, scattered variously among the different States according to a scale of importance which has nothing to do with the subject and which, noticeably partial in favor of certain European countries, does not correspond to the obvious reality of the facts;

Considering that it is clearly sophistical to pretend that in this way the equality of States as sovereign units in public international law is satisfied, and that there is no attack upon this right by subjecting it to mere conditions of exercise;

Considering that a right equal among all those possessing it is not subjected to simple conditions of exercise when some are restricted to periods more or less limited while others have the privilege of a continuous exercise thereof;

Considering therefore that it is necessary to maintain, for the Court in question, the same rule of continuous equality of representation of States consecrated in the Convention of 1899;

Considering that if the States excluded from the First Peace Conference have been invited to the Second, it is not with a view to having them solemnly sign an act derogatory to their sovereignty by reducing them to a scale of classification which the more powerful nations would like to have recognized;

Considering that the interests of peace are not served by creating among States through a contractual stipulation categories of sovereignty that humiliate some of the profit of others, by sapping the bases of the existence of all, and by proclaiming with a strange lack of logic the legal predominance of might over right;

Considering that if the new Court is to be set upon such foundations it is better not to create it, the more so because for the pacific settlement of international disputes the nations have at their disposal the present Court as well as the right which this Conference recognizes in them, and which it could not deny them, to have recourse to other arbitrators;

Considering that with this right admitted there is no advantage in having two courts alongside of each other and equally considered as permanent;

Considering that if the capital difficulty complained of in the present Court is a lack of true permanence, it would be much more practical and useful to give it permanence by correcting this curable imperfection than to undertake this duplication of the arbitral Court;

Considering that it is not possible to reach such a desideratum by utilizing the elements of the present Court to submit it to a reform which gives it a different consistence and at the same time a real permanence;

Considering that in order to procure for it permanence it is by no means necessary that all its members reside at the seat of the Court, at whose plenary

sessions a quorum should rather be very small, for example, a quarter of
[1047] the whole number of judges appointed; by stipulating for this number of members, by rota, the duty of residing at any point in Europe whence they can arrive at The Hague in twenty-four hours when summoned;

Considering that on this basis we should decide on the number of fifteen judges or even less, it would be still preferable if the total number of judges were inferior to that of the number of signatory States;

Considering, in short, conformably to the rules accepted in the first Convention of 1899, that the signatory Powers should be recognized as having the power to come to an understanding for a common designation of one or more members, and besides, of permitting the representative already appointed by one State to be chosen by others;

Considering, moreover, that the right of representation on the Court would be voluntary, like all rights in their exercise, that certain States probably would abstain therefrom, and that besides in order to exercise it, it would be necessary previously to offer secure pledges for the accomplishment of the duty of paying the expenses of the judge appointed;

Considering that in this way we might arrive, for the plenary sessions of the Court, at an actual body less numerous even than that resulting from the combination provided by the Anglo-German-American draft;

Considering that by this reduction in the ordinary quorum the functions of the Court would gain, not only in facility and dispatch, but also in completeness and efficiency, for in judicial bodies that are too numerous in their membership there is always a sad tendency among their members to rely upon one another, which fact results in reducing to a very small minority those who work, study, and do their duty with full information of the case;

Considering, furthermore, that even this quorum would only have to act in certain cases, when the interested parties required it, or when there might be certain difficulties to solve, for, in pursuance of the very essence of arbitration, whose character should not be denatured, it would be necessary to assure to the parties engaged in the dispute the right of electing from the number of the Court the judge or the judges to whom they agree to submit the settlement of their controversy;

The delegation of Brazil, in accordance with the most precise instructions of its Government, cannot acquiesce in the proposal under discussion, and permits itself to offer the following bases for the organization of another project:

I

For the constitution of the new Permanent Court of Arbitration each Power shall designate, under the conditions stipulated in the Convention of 1899, a person able to discharge worthily as a member of that institution the duties of arbitrator.

It shall also have the right to appoint a deputy.

Two or more Powers may agree upon the designation in common of their representatives on the Court.

The same person may be designated by different Powers.

The signatory Powers shall choose, so far as they can, their representatives in the new Court from those composing the existing Court.

II

When the new Court is organized the present Court shall cease to exist.

[1048] III

The persons appointed shall serve for nine years, and cannot be displaced save in cases where, according to the legislation of the respective country, permanent magistrates lose office.

IV

A Power may exercise its right of appointment only by engaging to pay the honorarium of the judge that it is to designate, and by making the deposit thereof every year in advance on the conditions fixed by the Convention.

V

In order that the Court may deliberate in plenary session, at least a quarter of the members appointed must be present.

In order to ensure this possibility the members appointed shall be divided into three groups according to the alphabetical order of the signatures to the Convention.

The judges included in each of these groups shall sit in rotation for three years, during which they shall be obliged to fix their residence at a point whence they can reach The Hague within twenty-four hours on telegraphic summons.

However, all members of the Court have the right, if they wish it, of sitting always in the plenary sessions, even though they do not belong to the group especially called to sit.

VI

The parties in dispute are free either to submit their controversy to the full Court or to choose from the Court, to settle their difference, the number of judges that they agree upon.

VII

The Court will be convened in plenary session when it has to pass judgment on disputes the settlement of which has been entrusted to it by the parties, or, in a matter submitted by them to a smaller number of arbitrators, when the latter appeal to the full Court for the purpose of settling a question arising among them during the trial of the case.

VIII

In order to complete the organization of the Court on these bases everything in the provisions of the draft of England, Germany, and the United States shall be adopted that is consistent therewith and seems proper to adopt.

[1049]

Annex 84

DRAFT OF A CONVENTION PRESENTED BY THE DELEGATIONS OF GERMANY, THE UNITED STATES OF AMERICA, AND GREAT BRITAIN [1]

SECOND EDITION

PART I.—*Constitution of the International Court of Justice*

ARTICLE 1

With a view to promoting the cause of arbitration the signatory Powers agree to constitute, alongside of the Permanent Court of Arbitration, an International Court of Justice, of easy and gratuitous access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

ARTICLE 2

The International Court of Justice is composed of judges and deputy judges, of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present Convention.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

ARTICLE 4

The judges of the International Court of Justice are equal, and rank according to the date on which their appointment was notified (Article 3, paragraph 1), and, if they sit by rota (Article 6, paragraph 2), according to the date on which they entered upon their duties. The judge who is senior in point of age takes precedence when the date of notification is the same. The deputy judges rank below the judges.

[1050] The judges and deputy judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

[1] See also annexes 80, 85 and 86.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

ARTICLE 5

The Court is composed of seventeen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 6

The judges appointed by the signatory Powers whose names follow: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan and Russia are always summoned to sit.

The judges and deputy judges appointed by the other Powers shall sit by rota as shown in the table hereto annexed. Their functions may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

ARTICLE 7

If a Power in dispute has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of the case. Lots are then to be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other party in dispute.

ARTICLE 8

The Court annually nominates three judges, who form a special committee during the year, and three more to replace them should the necessity arise. They are balloted for. The persons who secure the largest number of votes are considered elected. The committee itself elects its president. If need be he shall be drawn by lot.

Only judges who are called upon to sit can be appointed to this committee. A member of the committee cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant,* is one of the parties.

The members of the committee are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 9

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act there in any capacity whatsoever so long as his appointment lasts.

[1051] ARTICLE 10

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

ARTICLE 11

The judges of the International Court of Justice receive during the years when they are called upon to sit an annual salary of . . . Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

While the Court is sitting, or while they are carrying out the duties conferred upon them by this Convention, they are entitled to receive the sum of . . . florins *per diem*. They further receive a traveling allowance fixed in accordance with regulations existing in their own country.

These emoluments are included in the general expenses of the Court, and are paid through the International Bureau created by the Convention of July 29, 1899.

ARTICLE 12

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 13

The seat of the International Court of Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The special committee (Article 8) may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 14

The Administrative Council fulfills with regard to the International Court of Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 15

The International Bureau acts as registry to the International Court of Justice and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The necessary secretaries, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 16

The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The session does not take place if the special committee decides that business does not require it. The committee has also the right to summon the court in extra session.

ARTICLE 17

(Provisions respecting the relations of the International Court of Justice with the International Prize Court, especially as regards holding office as judge in both courts.)

[1052] ARTICLE 18

The special committee addresses every year to the Administrative Council a report on the doings of the Court. This report shall be communicated to the judges and deputy judges of the Court.

PART II.—*Competency and procedure*

ARTICLE 19

The International Court of Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

ARTICLE 20

The special committee (Article 8) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed in seeking a summary procedure;

2. To discharge the duties assigned to commissions of inquiry by the Convention of July 29, 1899, so far as the Court is entrusted with such inquiry by the parties in dispute acting in common agreement.

ARTICLE 21

The special committee is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic understanding in the case of:

1. A dispute arising from contract debts claimed as due to the *ressortissants* of one country by the Government of another country, and for the settlement of which an offer of arbitration has been accepted

Proposal of the German delegation

2. A dispute covered by a general treaty of arbitration providing for a *compromis* in all disputes and containing no stipulation to the contrary. Recourse cannot, however, be had to the Court if the Government of the other country declares that in its opinion the dispute does not come within the category of questions to be submitted to compulsory arbitration.

ARTICLE 22

The parties concerned may each nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the committee. If the committee acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court.

[1053]

ARTICLE 23

The International Court of Justice follows the rules of procedure set forth in Part IV, Chapter 3, of the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 24

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the

service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

ARTICLE 25

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

ARTICLE 26

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

The special committee reaches its decisions by a majority of the members, including those added in virtue of Article 22.

ARTICLE 27

The judgment of the Court and the special committee must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 28

The general expenses of the International Court of Justice are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 6.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE 29

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

Within a year from the ratification of the present Convention it shall meet in order to elaborate these rules.

[1054] ARTICLE 30

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

PART III.—*Final provisions*

ARTICLE 31

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 32

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

Annex 85

DRAFT OF A CONVENTION PRESENTED BY THE DELEGATIONS OF GERMANY, THE UNITED STATES OF AMERICA, AND GREAT BRITAIN[1]

THIRD EDITION

PART I.—*Constitution of the International Court of Justice*

ARTICLE 1

With a view to promoting the cause of arbitration the signatory Powers agree to constitute, alongside of the Permanent Court of Arbitration, an International Court of Justice, of easy and gratuitous access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

[1055] ARTICLE 2

The International Court of Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration.

The appointment shall be made within the six months following the ratification of the present Convention.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative

[1] See annexes 80, 84 and 86.

Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

Article 4

The judges of the International Court of Justice are equal, and rank according to the date on which their appointments were notified (Article 3, paragraph 1), and, if they sit by rota (Article 7, paragraph 2), according to the date on which they entered upon their duties. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

Article 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

Article 6

The Court is composed of seventeen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

Article 7

The judges and deputy judges sit in the order indicated by the table hereto annexed.

The functions of judge and deputy judge may be exercised by the same person if the plurality of offices is compatible with the order of the rota contemplated in the above-mentioned table. Under the same condition, the same judge may be named by several Powers.

[1056] ### Article 8

If a Power in dispute has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of the case. Lots are then to be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other party in dispute.

If several Powers act together in the same suit, the preceding provision is not applicable except in the case where none of them has already a judge sitting in the Court. If none of them have already a judge sitting in the Court, it is the duty of the said Powers to come to an understanding, and, if need be, to draw lots for the nomination of the judge.

ARTICLE 9

The Court annually nominates three judges, who form a special commission during the year, and three more to replace them should the necessity arise. They are balloted for. The persons who secure the largest number of votes are considered elected. The commission itself elects its president. If need be he shall be drawn by lot.

Only judges who are called upon to sit can be appointed to this commission. A member of the commission cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant,* is one of the parties.

The members of the commission are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 10

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act there in any capacity whatsoever so long as his appointment lasts.

ARTICLE 11

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

ARTICLE 12

The judges of the International Court of Justice receive during the years when they are called upon to sit an annual salary of . . . . . Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

While the Court is sitting, or while they are carrying out the duties conferred upon them by this Convention, they are entitled to receive a sum of . . . . . florins *per diem.* They further receive a traveling allowance fixed in accordance with regulations existing in their own country. These provisions are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court, and are paid through the International Bureau created by the Convention of July 29, 1899.

[1057] ARTICLE 13

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 14

The seat of the International Court of Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The special commission (Article 9) may choose, with the assent of the

parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 15

The Administrative Council fulfills with regard to the International Court of Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 16

The International Bureau acts as registry to the International Court of Justice and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 17

The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The session does not take place if the special commission decides that business does not require it. The commission has also the right to summon the Court in extra session.

ARTICLE 18

The special commission addresses every year to the Administrative Council a report on the doings of the Court. This report shall be communicated to the judges and deputy judges of the Court.

ARTICLE 19

The judges of the International Court of Justice can also exercise the functions of judge in the International Prize Court.

PART II.—*Competency and procedure*

ARTICLE 20

The International Court of Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

[1058] ARTICLE 21

The special commission (Article 9) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part . . . of the Convention of July 29, 1899, is to be applied;

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the Court is entrusted with such inquiry by the parties in dispute acting in common agreement. With the assent of the parties concerned, and as an exception to Article 10, paragraph 1, the members of the commission who have taken part in the inquiry may sit as judges, if the case in dispute should be the subject of an arbitration either of the Court or of the commission itself.

ARTICLE 22

The special commission is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach a diplomatic understanding in the case of:

1. A dispute arising from contract debts claimed from one Power by another Power as due to its *ressortissants*, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

Proposal of the German delegation

2. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either expressly or by concrete stipulations, excluding the settlement of the *compromis* from the competence of the special commission. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration.

ARTICLE 23

The parties concerned may each nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the commission.

If the commission acts as a commission of inquiry, this task may be intrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

ARTICLE 24

The contracting Powers only may have access to the International Court of Justice set up by the present Convention.

[1059] ARTICLE 25

The International Court of Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 26

The Court determines what language it will itself use and what languages may be used before it.

In cases laid before the special commission, the decision rests with this commission.

ARTICLE 27

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of July 29, 1899.

ARTICLE 28

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

ARTICLE 29

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

ARTICLE 30

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

The special commission reaches its decisions by a majority of the members, including those added in virtue of Article 23. When the right of attaching a member to the commission has been exercised by one of the parties only, the vote of the member attached is not counted, if the votes are evenly divided.

ARTICLE 31

The judgment of the Court and the special commission must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

[1060] ARTICLE 32

Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 33

The general expenses of the International Court of Justice are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 7.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE 34

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

After the ratification of the present Convention, the Court shall meet as

early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the special commission.

ARTICLE 35

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

PART III.—*Final provisions*

ARTICLE 36

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 37

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

[1061]

PROVISIONAL SUGGESTIONS FOR USE IN THE DISCUSSION OF THE COMPOSITION OF THE INTERNATIONAL COURT OF JUSTICE

Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Twelve Years

	Judges	*Deputy Judges*	*Judges*	*Deputy Judges*
	First Year		*Second Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Argentine Republic		Argentine Republic	
4	Austria-Hungary		Austria-Hungary	
5	Belgium		Belgium	
6	Bolivia		China	
7	China		Colombia	
8	Spain		Spain	
9	France		France	
10	Great Britain		Great Britain	
11	Italy		Italy	
12	Japan		Japan	
13	Netherlands		Netherlands	
14	Roumania		Roumania	
15	Russia		Russia	
16	Sweden		Sweden	
17	Turkey		Turkey	

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	Third Year		*Fourth Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Austria-Hungary		Austria-Hungary	
4	Brazil		Brazil	
5	Chile		Chile	
6	Costa Rica		Cuba	
7	Denmark		Denmark	
8	Spain		France	
9	France		Great Britain	
10	Great Britain		Greece	
11	Greece		Italy	
12	Italy		Japan	
13	Japan		Netherlands	
14	Netherlands		Portugal	
15	Portugal		Russia	
16	Russia		Siam	
17	Turkey		Turkey	
	Fifth Year		*Sixth Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Austria-Hungary		Austria-Hungary	
4	Dominican Republic		Bulgaria	
5	Ecuador		Spain	
6	Spain		France	
7	France		Great Britain	
8	Great Britain		Guatemala	
9	Italy		Haiti	
10	Japan		Italy	
11	Mexico		Japan	
12	Norway		Luxemburg	
13	Netherlands		Mexico	
14	Russia		Norway	
15	Serbia		Persia	
16	Switzerland		Russia	
17	Turkey		Switzerland	

	Judges	Deputy Judges	Judges	Deputy Judges
[1063]				
	Seventh Year		*Eighth Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Argentine Republic		Argentine Republic	
4	Austria-Hungary		Austria-Hungary	
5	Belgium		Belgium	
6	China		China	
7	Spain		Spain	
8	France		France	
9	Great Britain		Great Britain	
10	Honduras		Italy	
11	Italy		Japan	
12	Japan		Nicaragua	
13	Netherlands		Netherlands	
14	Roumania		Roumania	
15	Russia		Russia	
16	Sweden		Sweden	
17	Turkey		Turkey	
	Ninth Year		*Tenth Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Austria-Hungary		Austria-Hungary	
4	Brazil		Brazil	
5	Chile		Chile	
6	Denmark		Denmark	
7	Spain		France	
8	France		Great Britain	
9	Great Britain		Greece	
10	Greece		Italy	
11	Italy		Japan	
12	Japan		Paraguay	
13	Panama		Netherlands	
14	Netherlands		Portugal	
15	Portugal		Russia	
16	Russia		Siam	
17	Turkey		Turkey	
[1064]				
	Eleventh Year		*Twelfth Year*	
1	Germany		Germany	
2	United States of America		United States of America	
3	Austria-Hungary		Austria-Hungary	
4	Spain		Bulgaria	
5	France		Spain	
6	Great Britain		France	
7	Italy		Great Britain	
8	Japan		Italy	
9	Mexico		Japan	
10	Norway		Mexico	
11	Netherlands		Montenegro	
12	Peru		Norway	
13	Russia		Persia	
14	Salvador		Russia	
15	Serbia		Switzerland	
16	Switzerland		Uruguay	
17	Turkey		Venezuela	

Annex 86

DRAFT OF A CONVENTION PRESENTED BY THE DELEGATIONS OF GERMANY, THE UNITED STATES OF AMERICA, AND GREAT BRITAIN, VOTED BY THE COMMISSION [1]

PART I.—*Constitution of the Court of Arbitral Justice*

ARTICLE 1

With a view to promoting the cause of arbitration, the signatory Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

[1065]

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are named by the signatory Powers that select them, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

ARTICLE 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention of July 29, 1899. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

ARTICLE 4

The judges of the Court of Arbitral Justice are equal, and rank according to the date on which their appointments were notified (Article 3, paragraph 1). The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

[1] See also annexes 80, 84 and 85.

ARTICLE 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the Power which appointed him, or of which he is a *ressortissant,* is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

[1066] A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

ARTICLE 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem.* They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention of July 29, 1899.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council fulfills with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the International Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June, and lasts until all the business on the agenda has been transacted.

[1067] The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

PART II.—*Competency and procedure*

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases, which in virtue either of a general undertaking to have recourse to arbitration or of a special agreement, are submitted to it.

ARTICLE 18

The delegation (Article 6) is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part . . . . . of the Convention of July 29, 1899, is to be applied.

2. To hold an inquiry under and in accordance with Part III of the Convention of July 29, 1899, in so far as the delegation is entrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute should be the subject of an arbitration either of the Court or of the delegation itself.

ARTICLE 19

The delegation is also competent to settle the *compromis* (Article 31 of the Convention of July 29, 1899), if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute arising from contract debts claimed from one Power by [1068] another Power as due to its *ressortissants,* and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

2. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

ARTICLE 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

ARTICLE 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

ARTICLE 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention of July 29, 1899, except in so far as the procedure is laid down in the present Convention.

ARTICLE 23

The Court determines what language it will itself use and what languages may be used before it.

ARTICLE 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 39, paragraph 2, of the Convention of July 29, 1899.

ARTICLE 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

[1069] ARTICLE 26

The discussions of the Court are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties in dispute cannot preside.

ARTICLE 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions of the Court are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 29

Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30

The provisions of Articles 21 to 29 receive analogous application in the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of this delegate is not recorded if the votes are evenly divided.

ARTICLE 31

The general expenses of the Court of Arbitral Justice are borne by the signatory Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

ARTICLE 32

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the delegation.

ARTICLE 33

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the signatory Powers, which will consider together as to the measures to be taken.

[1070]

PART III.—*Final provisions*

ARTICLE 34

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

Annex 87

VŒU VOTED BY THE COMMISSION

The Conference recommends to the signatory Powers the adoption of the project it has voted for the creation of a Court of Arbitral Justice, and putting it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court.

[1071]

PROPOSITIONS RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT

Annex 88

PROPOSITION OF THE GERMAN DELEGATION REGARDING THE PRIZE COURT

PART I.—*Competence in prize cases*

ARTICLE 1

The validity of the capture of a merchant ship or its cargo shall be decided by a prize court.

Such jurisdiction is exercised in the first instance by the national prize court of the belligerent captor; in the second instance by a High International Prize Court.

ARTICLE 2

When the prize court pronounces the capture of the vessel or of the goods to be valid, it shall be disposed of in accordance with the laws of the captor State.

When it pronounces the capture to be invalid, the court shall order the restitution of the vessel or goods, fixing the amount of the damages, and, in case the vessel or goods shall have been destroyed, it shall determine the compensation to be paid to the owner.

The judgments of the prize court shall be officially notified to the parties. They shall not be executory until they have obtained the force of *res judicata.*

ARTICLE 3

The judgments of a prize court may be brought on appeal before a High International Court, which shall be organized upon the outbreak of a naval war and shall pass upon all prize cases arising out of the war. In case several States are engaged in the naval war, there shall be formed as many different High Courts as the number of belligerents divided by two.

The judgments of the High Court shall be executed immediately.

PART II.—*Constitution of the High International Prize Court*

ARTICLE 4

The High International Prize Court shall be composed of five members: two admirals and three members of the Permanent Court of Arbitration of The Hague. Within the two weeks following the outbreak of hostilities, each of the belligerent parties shall designate an admiral and shall also address [1072] itself to a neutral Power, which in turn shall choose another member,

within the two weeks following, from among the members of the Court of Arbitration appointed by it. Within a further period of two weeks the two neutral Powers shall address themselves conjointly to a third neutral Power, which shall be selected by lot, if necessary, and this Power shall, within the two ensuing weeks, choose the fifth member from among the members of the Court of Arbitration appointed by it.

Article 5

The High Prize Court meets upon the first appeal from the judgment of a prize court.

Upon the conclusion of peace, it dissolves as soon as all the prize cases arising out of the war shall have been definitively settled.

Article 6[1]

The High Prize Court shall sit at The Hague.

Except in case of necessity, it cannot be transferred elsewhere without the assent of the two belligerent parties.

Article 7

The High Prize Court shall select its president by an absolute majority of votes from among those of its members who belong to the Permanent Court of Arbitration of The Hague. If need be, there shall be a second ballot.

Article 8[2]

In case of the death, retirement, or disability from any cause of one of the members of the High Prize Court, his place shall be filled in the same way as he was appointed.

Article 9

The members of the High Prize Court shall receive the traveling allowances to which they are entitled under the laws of their country. They shall be allowed, in addition, a monthly salary of 1,500 Dutch florins, which shall be paid to them through the International Bureau of the Court of Arbitration of The Hague.

Article 10[3]

The International Bureau of the Hague Arbitration Court serves as registry for the High Prize Court.

This Bureau is the channel for communications relative to the meeting of the Court.

It has the custody of the archives and conducts the administrative business.

Article 11[4]

The High Prize Court decides on the choice of languages to be used by itself, and to be authorized for use before it. In every case the language of the interested belligerent party may be used before it.

[1] See Arbitration Convention, Article 36.
[2] See *ibid.*, Article 35.
[3] See *ibid.*, Article 22.
[4] See *ibid.*, Article 38.

[1073]

ARTICLE 12 [1]

In all prize cases in which they are interested as captor States, belligerent parties are entitled to appoint delegates or special agents to attend the High Court to act as intermediaries between themselves and the High Court.

Further, they are authorized to commit the defense of their rights and interests before the High Court to counsel or advocates appointed by them for this purpose.

ARTICLE 13

A private party must be represented before the High Prize Court by an attorney or proxy, who may be either an advocate in a court of appeal or a supreme court of the territory of one of the contracting parties, or a professor of law in an advanced school of one of these territories.

ARTICLE 14

For all notices and the securing of evidence the High Prize Court may apply to the Government of the State on whose territory the notice is to be served or the evidence secured.

Execution of the request may not be refused, unless the State requested considers it calculated to impair its sovereign rights or its safety. If the request is complied with, the State requested shall take into account only the cash expenses actually incurred.

The High Court is free to have recourse in these cases to the intermediary of the State on whose territory it sits.

PART III.—*Procedure in the High Prize Court*

ARTICLE 15

The belligerent party and the private party have a right to appeal.

ARTICLE 16

Appeal may be entered in the prize court or in the International Bureau,[2] either in writing or by telegraph.

The period within which appeal must be entered is fixed at two months, counting from the day the party appellant is notified of the judgment of the prize court.

ARTICLE 17

If appeal is entered in the prize court, this court, without considering the question whether the appeal was entered in due time as above, shall forward within seven days all the records of the case to the International Bureau, which shall transmit them to the High Prize Court.

If appeal is entered in the International Bureau, this Bureau shall notify the prize court directly, by telegraph, if possible. The prize court shall then act in conformity with paragraph 1 of the present article.

[1] See Article 37 of the Arbitration Convention.
[2] See Article 10, *supra*.

[1074]

ARTICLE 18

The High Prize Court shall officially notify to the parties, decrees and decisions made by it in their absence.

Notices to be served at the seat of the High Court may, by its order, be served by the International Bureau.

ARTICLE 19

All appeals, which shall not have been taken within the period hereinbefore fixed, must be rejected by the High Court, without further ceremony, as non-admissible.

Nevertheless, the High Court may, upon request, make an exception in favor of a party who, as a result of *force majeure,* may not have been able to enter his appeal within the period fixed, and shall restore to this party the right to appeal. The request must be made by the party within two months following the circumstances of *force majeure,* and, in any event, before the dissolution of the High Prize Court.[1]

ARTICLE 20

If appeal has been entered within the period fixed, the High Prize Court must officially notify the respondent with a certified true copy of the appeal, either in writing or by telegraph.

ARTICLE 21

The High Prize Court shall fix the periods within which the parties must produce their written declarations and counter-declarations, and the instruments, papers, and documents relating thereto.

A certified true copy of every paper produced by either party shall be officially transmitted by the High Prize Court to the other party.

ARTICLE 22

Upon the expiration of the periods mentioned in Article 21, paragraph 1, there shall be an oral argument before the High Court, to which the parties must be officially summoned.

If a party does not appear, despite the fact that he has been duly cited, the High Court may, upon the request of the other party, open the argument on appeal.

ARTICLE 23[2]

The discussions are under the direction of the president.

They are only public if it be so decided by the High Court, with the assent of the belligerent party.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes alone have an authentic character.

ARTICLE 24

After the oral argument, the High Court may, either on its own initiative or upon the request of either of the parties, and in conformity with Article 14,

[1] See Article 5, paragraph 2.
[2] See Article 41 of the Arbitration Convention.

secure supplementary evidence respecting the taking of testimony before the prize court. The High Court may order this supplementary evidence to be taken either before itself or before such of its members as it shall have commissioned for this purpose, provided this can be done without resort to compulsion or the use of threats.

The parties are entitled to be present at the taking of testimony. A certified true copy of the proceedings shall be officially transmitted to them by the High Court.

[1075] ARTICLE 25

After the evidence has been secured, the High Court shall officially summon the two parties and order the oral argument to be resumed.

ARTICLE 26

The High Prize Court shall take into account, in reaching its decisions, the entire record of the case and the oral statements of the parties, and shall render its decisions in the full and entire independence of its conviction.

ARTICLE 27 [1]

The deliberations of the High Prize Court shall take place in private.

Every decision shall be taken by a majority of members.

ARTICLE 28 [2]

The judgment of the High Prize Court must state the reasons on which it is based. It shall be drawn up in writing and signed by each member of the High Court.

The members of the High Court who are in the minority may record their dissent when signing.

ARTICLE 29 [3]

The judgment shall be read out at a public sitting of the High Prize Court and officially communicated to the parties.

When it has been so communicated, the High Court must transmit to the captor State the record of the prize court, together with a copy of the judgment of the High Court. The judgment shall be executed through the intermediary of this State.

ARTICLE 30

Each party shall pay its own costs.

The party against whom the Court decides shall bear, in addition, the cost of the trial, and shall pay a contribution to the general expenses of the High Prize Court. This contribution shall be determined proportionally to the value of the subject-matter of the case, and shall not exceed 1 per cent. thereof. The amount of the expenses to be paid by the losing party shall be fixed in the judgment of the court.

If the appeal is taken by a private party, this party shall be required to deposit, with the International Bureau, security in the amount fixed by the High

[1] See Arbitration Convention, Article 51.
[2] See *ibid.*, Article 52.
[3] See *ibid.*, Article 53.

Court on account of the eventual expenses provided for in paragraph 2 above. The Court shall be entitled to postpone the opening of the appeal proceedings until the amount of this security has been deposited.

ARTICLE 31

To provide for the eventual expenses of the High Prize Court, each belligerent party shall be required to make a preliminary deposit of 25,000 Dutch florins with the International Bureau, and this within the two months following the declaration of war. Further deposits of like amount shall be made by the belligerent parties whenever the deposits made and the receipts provided for in Article 30, paragraph 2, shall have been exhausted.

Upon the dissolution of the High Prize Court, the International Bureau shall render an account to the belligerent parties and reimburse them their shares of the balance.

[1076]

Annex 89

PROPOSITION OF THE BRITISH DELEGATION

Draft convention relative to a Permanent International Court of Appeal

ARTICLE 1

A Permanent International Court of Appeal shall be organized, having for its object the application of international laws in naval prize cases between the signatory Powers.

ARTICLE 2

The Permanent Court shall be competent to pass upon all cases in which a prize court has rendered a decision directly affecting the interests of a neutral Power or of its subjects, and when that Power contends that the decision is in error, either in the matter of law or in the matter of fact.

It is understood that, in any country, it is only a decision of the court of last instance, to which the neutral Power or its subject has access, that may be appealed to the Permanent Court.

ARTICLE 3

A neutral Power brought into a case by the fact that the rights of its subject have been impaired by a decision of a court of last instance, as mentioned in the foregoing article, is entitled to apply to the Permanent Court in order to secure a new decision either by annulment or by appeal.

ARTICLE 4

Each of the signatory Powers, whose merchant marine, at the time of the signing of the present Convention, exceeds a total of 800,000 tons, shall desig-

nate within three months from the ratification of the present instrument a jurist of recognized competence in questions of international naval law, whose moral character is of the highest, and who is disposed to accept the office of judge of this Court. Each Power shall likewise designate a deputy judge having the same qualifications.

ARTICLE 5

The president of the Court shall be named by the Powers, in alphabetical order, who have designated judges in the Court, and shall hold office for one year, beginning on the first of January. The International Bureau of The Hague shall be charged with the execution of this provision.

If there is a tie vote, the president shall decide.

The president who presides at the beginning of a litigation shall continue to act until its close.

ARTICLE 6

If the legal question to be decided has already been settled by a convention to which the Powers in dispute are signatories, the decision of the Court shall be in conformity with the stipulations of the convention.

[1077] In the absence of a convention, if all civilized nations are in agreement upon a legal point, the Court must likewise render a decision in conformity with this general opinion.

Where these conditions do not exist, the Court shall render its decision by applying the principles of international law.

ARTICLE 7

The signatory Powers engage to comply in good faith with the judgment of this court and to execute its orders against its own subjects, and also to make the necessary changes in their laws to render the orders of the Court valid and effective.

ARTICLE 8

In the absence of a convention between the parties, the procedure is as follows:

ARTICLE 9

The plaintiff forwards to the Bureau a document informing the latter of the nature of his request and the reasons therefor.

ARTICLE 10

The Bureau transmits the plaintiff's document without delay to the defendant, and within two months from the receipt of this document the defendant forwards his reply to the Bureau.

ARTICLE 11

The Bureau transmits the defendant's reply without delay to the plaintiff.

ARTICLE 12

The Court shall include all the judges, and all shall sit, with the exception of the judges appointed by the Powers in litigation.

In case of the absence of any one of the members called upon to act, the deputy judge shall sit in his stead.

ARTICLE 13

The court meets on the date appointed by the judges.

ARTICLE 14

The Court may exercise its functions, if occasion demands, in the absence of the defendant.

ARTICLE 15

The judges of the Court enjoy diplomatic privileges and immunities in the performance of their duties outside their country.

ARTICLE 16

With the necessary changes, Articles 22, 23, 25, 26, 37-54, and 57 of the Convention for the pacific settlement of international disputes, concluded at The Hague on July 29, 1899, govern the Permanent Court, its judges and its procedure.

[1078]

Annex 90

PROPOSITIONS RELATIVE TO THE CREATION OF AN INTERNATIONAL PRIZE COURT

Questionnaire drawn up by his Excellency Sir Edward Fry, and Messrs. Kriege and Louis Renault. (Direction of the subcommission.)

1. Is there occasion to create an International Court of Appeal for prize cases?

2. Shall the Court to be created decide only between the belligerent State to which the captor belongs and the State making claim for its subjects who have suffered loss from the capture, or may the matter be laid before it directly by the private persons claiming to have suffered loss?

3. Must this Court take cognizance of all prize cases, or only of cases in which the interests of neutral Governments or private citizens are involved?

4. When shall the International Court begin to act?

May the case be laid before it as soon as the national courts of first instance shall have rendered their decision as to the validity of the capture, or is it necessary to wait until final judgment has been rendered in the State of the captor?

5. Shall the International Court be a permanent organization, or shall it be constituted only when a war breaks out?

6. Whether the Court be permanent or temporary, who may be members of it? Only jurists designated by nations having a navy of a size to be deter-

mined, or admirals and jurists, who are members of the Permanent Court of Arbitration, designated by the belligerents and by neutral States?

Will it be necessary, in a given litigation, to exclude the judges of the nationality of the interested parties?

7. What principles of law shall be applied in the High International Court?

8. Is it necessary to regulate the order and the method of taking testimony before the High Court?

[1079]

Annex 91

PROPOSITION OF THE DELEGATIONS OF GERMANY, UNITED STATES OF AMERICA, FRANCE, AND GREAT BRITAIN [1]

PART I.—*General provisions*

ARTICLE 1

The validity of the capture of a merchant ship or its cargo shall be decided before a prize court, in accordance with the present Convention, when neutral or enemy property is involved.

ARTICLE 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts shall be pronounced in public or officially notified to the owners concerned who are neutrals or enemies.

ARTICLE 3

The judgments of national prize courts may be brought before the International Prize Court—

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to:

(*a*) Cargo on board a neutral ship;

(*b*) Or an enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(*c*) Or finally a claim based upon the fact that the seizure has been effected in violation either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

ARTICLE 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or

[1] See also annexes 92 and 93.

if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2 *b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the
[1080] reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b*.

Article 5

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

Article 6

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2 *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Article 7

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

Article 8

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—*Constitution of the International Prize Court*

ARTICLE 9

The International Prize Court is composed of judges and deputy judges who will be appointed by the signatory Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

ARTICLE 10

The judges and deputy judges are appointed for a period of six years reckoned from the date on which the appointment shall have been notified to the Administrative Council of the Permanent Court of Arbitration. Their appointments can be renewed.

[1081] Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 11

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointments (Article 10, paragraph 1), and if they sit by rota (Article 12, paragraph 3), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

They enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before entering upon their duties the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and upon their conscience.

ARTICLE 12

The Court is composed of fifteen judges; nine judges constitute a quorum.

The judges appointed by the following signatory Powers: Germany, Austria-Hungary, the United States of America, France, Great Britain, Italy, Japan, and Russia, shall always be summoned to sit.

The judges and deputy judges appointed by the other Powers shall sit by rota as shown in the table hereto annexed.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 13

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge can, during his tenure of office, appear as agent or advocate before the International Prize Court nor act in any capacity whatever.

ARTICLE 14

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power which is a

party to the proceedings, or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

[1082] ARTICLE 15

Every three years the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

ARTICLE 16

The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country and, in addition, while the Court is sitting, or while they are carrying out duties conferred upon them by the Court, a monthly sum of . . . Netherland florins.

These payments are included in the general expenses of the Permanent Court of Arbitration and are paid through the International Bureau.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

ARTICLE 17

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure,* be transferred elsewhere without the consent of the belligerents.

ARTICLE 18

The Administrative Council is charged, with regard to the International Prize Court, with the same functions that it fulfills, under the Convention of July 29, 1899, as to the Permanent Court of Arbitration.

ARTICLE 19

The International Bureau of the Permanent Court of Arbitration acts as registry to the International Prize Court. It has charge of the archives and carries out the administrative work.

ARTICLE 20

The Court decides on the choice of languages to be used by itself and to be authorized for use before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

ARTICLE 21

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 22

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a

court of appeal or a high court of one of the signatory States or a lawyer practising before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

[1083] ARTICLE 23

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power applied to considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

PART III.—*Procedure in the International Prize Court*

ARTICLE 24

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at four months, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

ARTICLE 25

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 26

In the case provided for in Article 5, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within a month of the expiration of the period of two years.

ARTICLE 27

The Court officially notifies to the parties decrees or decisions made in their absence.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 28

If the appellant does not enter his appeal within the period laid down in Articles 24 or 26, it shall be rejected without further process.

Provided that he can show that he was prevented from so doing by *force majeure,* and that the appeal was entered within two months after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

[1084] ARTICLE 29

If the appeal is entered in time, a true copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

ARTICLE 30

If the litigation involves a prize in which there are other parties concerned than the parties who are before the Court, the latter will await before dealing with the case the expiration of the period laid down in Articles 24 or 26.

ARTICLE 31

The procedure before the International Court includes two distinct parts —the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, countercases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE 32

After the close of the pleadings, a public sitting is held in which the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on its own initiative, in order that supplementary evidence may be obtained.

ARTICLE 33

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 23, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 34

The parties must be summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 35

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

ARTICLE 36

The discussions take place in public subject to the right of a Power, who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions which are written up by secretaries appointed by the president. These minutes alone have an authentic character.

[1085] ARTICLE 37

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to proceed within the period fixed by the Court, the case proceeds without that party and the Court gives judgment in accordance with the material at its disposal.

ARTICLE 38

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements. It makes decision in accordance with its free and fully independent conviction.

ARTICLE 39

The Court considers its decision in private.

All questions shall be decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 4, paragraph 1, shall not be counted.

ARTICLE 40

The judgment of the Court must give the reasons on which it is based. It is signed by each of the judges that have taken part in it.

ARTICLE 41

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

ARTICLE 42

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to the amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding

paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE 43

The general expenses of the International Prize Court are borne by the signatory Powers in the proportion established for the International Bureau of the Universal Postal Union. Deduction shall be made of the payments made by the parties in accordance with Article 42, paragraph 2.

ARTICLE 44

When the Court is not sitting, the duties conferred upon it by Article 31 and Article 42, paragraph 3, are discharged by a committee of three judges whom the Court appoints.

[1086] ARTICLE 45

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

ARTICLE 46

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

PART IV.—*Final provisions*

ARTICLE 47

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A minute of the deposit of each ratification shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to all the signatory Powers.

ARTICLE 48

The Convention shall come into force six months after its ratification. The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts within six months following the ratification.

The Convention shall remain in force for twelve years, and shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in effect in the relations between the other Powers.

[1087]

Annex 92

PROPOSITION OF THE DELEGATIONS OF GERMANY, THE UNITED STATES OF AMERICA, FRANCE, AND GREAT BRITAIN[1]

(New Draft)

Part I.—*General provisions*

Article 1

The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved.

Article 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Article 3

The judgments of national prize courts may be brought before the International Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to:

(*a*) Cargo on board a neutral ship;

(*b*) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(*c*) A claim based upon the fact that the seizure has been effected in violation either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

Article 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2 *b*);

[1088] 2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment

[1] See also annexes 91 and 93.

of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b*.

ARTICLE 5

An appeal may also be brought by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled by the preceding article to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court.

The same appeal may be made by the neutral Power, to whom the interested persons belong.

ARTICLE 6

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

[1089] ARTICLE 7

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2 *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

ARTICLE 8

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national court pronounces the capture to be null, the Court can only be asked to decide as to the damages.

ARTICLE 9

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—*Constitution of the International Prize Court*

ARTICLE 10

The International Prize Court is composed of judges and deputy judges, who will be appointed by the signatory Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

ARTICLE 11

The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the appointment shall have been notified to the Administrative Council established by the Convention of July 29, 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 12

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointments (Article 11, paragraph 1), and if they sit by rota (Article 14, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence. The deputy judges rank after the judges.

The judges and deputy judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the judges and deputy judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE 13

The Court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 14

The judges appointed by the following signatory Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other Powers sit by rota as shown in the table hereto annexed; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

[1090]

ARTICLE 15

If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settle-

ment of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

ARTICLE 16

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge can, during his tenure of office, appear as agent or advocate before the International Prize Court nor act in any capacity whatever.

ARTICLE 17

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

ARTICLE 18

Every three years, the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

ARTICLE 19

The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of . . . Netherland florins *per diem.*

These payments are included in the general expenses of the Court, and are paid through the International Bureau established by the Convention of July 29, 1899.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

ARTICLE 20

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure,* be transferred elsewhere without the consent of the belligerents.

ARTICLE 21

The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration.

ARTICLE 22

The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

[1091] The necessary secretaries, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 23

The Court decides on the choice of languages to be used by itself, and to be authorized for use before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

ARTICLE 24

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 25

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the signatory States or a lawyer practising before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

ARTICLE 26

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power applied to considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

PART III.—*Procedure in the International Prize Court*

ARTICLE 27

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at four months, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

ARTICLE 28

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will

inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

[1092] When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 29

In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

ARTICLE 30

The Court officially notifies to the parties decrees or decisions made in their absence.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 31

If the appellant does not enter his appeal within the period laid down in Articles 27 or 29, it shall be rejected without further process.

Provided that he can show that he was prevented from so doing by *force majeure,* and that the appeal was entered within two months after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

ARTICLE 32

If the appeal is entered in time, a true copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

ARTICLE 33

If, in addition to the parties who are before the Court, there are other parties concerned having taken part in the trial before the national tribunals, the Court will await before dealing with the case the expiration of the period laid down in Articles 27 or 29.

ARTICLE 34

The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, countercases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE 35

After the close of the pleadings, a public sitting is held in which the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on its own initiative, in order that supplementary evidence may be obtained.

[1093] ARTICLE 36

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 26, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 37

The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 38

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

ARTICLE 39

The discussions take place in public subject to the right of a Power who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions which are written up by secretaries appointed by the president. These minutes alone have an authentic character.

ARTICLE 40

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

ARTICLE 41

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements.

ARTICLE 42

The Court considers its decision in private and the proceedings remain secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 43

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 44

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

[1094] ARTICLE 45

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays 1 per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE 46

The general expenses of the International Prize Court are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 14. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE 47

When the Court is not sitting, the duties conferred upon it by Article 34, paragraphs 2 and 3, and Article 45, paragraph 3, are discharged by a committee of three judges appointed by the Court. This committee decides by a majority of votes.

ARTICLE 48

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

ARTICLE 49

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

PART IV.—*Final provisions*

ARTICLE 50

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A minute of the deposit of each ratification shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to all the signatory Powers.

ARTICLE 51

The Convention shall come into force six months after its ratification. The International Court shall, however, have jurisdiction to deal with prize
[1095] cases decided by the national courts within six months following the ratification; in this case, the period fixed in Article 27 or Article 29 shall only be reckoned from the date when the Convention comes into force.

The Convention shall remain in force for twelve years, and shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in effect in the relations between the other Powers.

Annex 93

PROJECT OF A CONVENTION RELATIVE TO THE CREATION OF AN INTERNATIONAL PRIZE COURT[1]

VOTED BY THE COMMISSION

PART I.—*General provisions*

ARTICLE 1

The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved.

ARTICLE 2

Jurisdiction in matters of prize is exercised in the first instance by the national prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

ARTICLE 3

The judgments of national prize courts may be brought before the International Prize Court:

[1] See annexes 91 and 92.

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;

2. When the judgment affects enemy property and relates to:

(*a*) Cargo on board a neutral ship;

(*b*) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

[1096] (*c*) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

Article 4

An appeal may be brought:

1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (Article 3, No. 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, No. 2 *b*);

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph *b*.

Article 5

An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest.

The same rule applies in the case of persons belonging either to neutral States or to the enemy who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

Article 6

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the Court.

Article 7

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen

is a party to the proceedings, the Court is governed by the provisions of the said treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exsts, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article 3, No. 2 *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

[1097] The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Article 8

If the Court pronounces the capture of the vessel or cargo to be valid, it shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national court pronounces the capture to be null, the Court can only be asked to decide as to the damages.

Article 9

The signatory Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

Part II.—*Constitution of the International Prize Court*

Article 10

The International Prize Court is composed of judges and deputy judges, who will be appointed by the signatory Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

Article 11

The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the appointment is notified to the Administrative Council established by the Convention of July 29, 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

ARTICLE 12

The judges of the International Prize Court are all equal in rank and have precedence according to the date of the notification of their appointment (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

The deputy judges when acting are assimilated to the judges. They rank, however, after them.

ARTICLE 13

The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

[1098] Before taking their seat, the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

ARTICLE 14

The Court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

ARTICLE 15

The judges appointed by the following signatory Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other Powers sit by rota as shown in the table annexed to the present Convention; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.

ARTICLE 16

If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

ARTICLE 17

No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge or deputy judge can, during his tenure of office, appear as agent or advocate before the International Prize Court nor act for one of the parties in any capacity whatever.

ARTICLE 18

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same

right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

Article 19

Every three years, the Court elects its president and vice president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

Article 20

The judges on the International Prize Court are entitled to travelling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins *per diem.*

[1099] These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of July 29, 1899.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

Article 21

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure,* be transferred elsewhere without the consent of the belligerents.

Article 22

The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only representatives of contracting Powers will be members of it.

Article 23

The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the International Bureau acts as registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

Article 24

The Court determines which language it will itself use and what languages may be used before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

Article 25

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

ARTICLE 26

A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the signatory States, or a lawyer practising before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

ARTICLE 27

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose cannot be rejected unless the Power considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

[1100] The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

PART III.—*Procedure in the International Prize Court*

ARTICLE 28

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

ARTICLE 29

If the notice of appeal is entered in the national court, this court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will inform the national court directly, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

ARTICLE 30

In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

ARTICLE 31

If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.

Provided that he can show that he was prevented from so doing by *force majeure,* and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

ARTICLE 32

If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

ARTICLE 33

If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph 3, the Government who has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Articles 28 or 30.

[1101] ARTICLE 34

The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

ARTICLE 35

After the close of the pleadings, a public sitting is held on a day fixed by the Court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on its own initiative, in order that supplementary evidence may be obtained.

ARTICLE 36

The International Court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

ARTICLE 37

The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

ARTICLE 38

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

ARTICLE 39

The discussions take place in public, subject to the right of a Power who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the president and registrar, and these minutes alone have an authentic character.

ARTICLE 40

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

ARTICLE 41

The Court officially notifies to the parties decrees or decisions made in their absence.

[1102] ARTICLE 42

The International Prize Court determines without restraint the value to be given to all the facts, evidence, and oral statements.

ARTICLE 43

The Court considers its decision in private and the proceedings remain secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.

ARTICLE 44

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it, and also of the assessors, if any; it is signed by the president and registrar.

ARTICLE 45

The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

ARTICLE 46

Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays 1 per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

ARTICLE 47

The general expenses of the International Prize Court are borne by the signatory Powers in proportion to their share in the composition of the Court as laid down in Article 15 and in the annexed table. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

ARTICLE 48

When the Court is not sitting, the duties conferred upon it by Article 32, Article 34, paragraphs 2 and 3, Article 35, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three judges appointed by the Court. This delegation decides by a majority of votes.

[1103]

ARTICLE 49

The Court itself draws up its own rules of procedure, which must be communicated to the signatory Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

ARTICLE 50

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the signatory Powers, which will consider together as to the measures to be taken.

PART IV.—*Final provisions*

ARTICLE 51

The present Convention does not apply as of right except when war exists between two or more of the contracting Powers. It ceases to be applicable from the time that a non-contracting Power joins one of the belligerents.

It is further understood that an appeal to the International Prize Court can only be brought by a contracting Power or the subject or citizen of a contracting Power.

In the cases mentioned in Article 5, the appeal is only admitted when both

the owner and the person entitled to represent him are equally contracting Powers or the subjects or citizens of contracting Powers.

Article 52

The present Convention shall be ratified and the ratifications shall be deposited at The Hague as soon as all the Powers mentioned in Article 15 and in the table annexed are in a position to do so.

The deposit of the ratifications shall take place, in any case, on June 30, 1909, if the Powers which are ready to ratify furnish nine judges and nine deputy judges to the Court, qualified to validly constitute a Court. If not, the deposit shall be postponed until this condition is fulfilled.

A minute of the deposit of ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the Powers referred to in the first paragraph.

Article 53

The Powers referred to in the first paragraph of the preceding article are entitled to sign the present Convention up to the deposit of the ratifications contemplated in paragraph 2 of the same article.

After this deposit, they can at any time adhere to it, purely and simply by making known their intention in a notice addressed to the Netherland Government.

When the first adhesion is made, the Minister of Foreign Affairs of the Netherlands shall begin a *procès-verbal* in which he shall enter the adhesions as they appear. The documents authorizing adhesions shall be attached to the said *procès-verbal.*

[1104] After each adhesion, the above-named Minister shall transmit a certified copy of the *procès-verbal* to all the Powers referred to in paragraph 1 of the preceding article.

Article 54

The present Convention shall come into force six months from the deposit of the ratifications contemplated in Article 52, paragraphs 1 and 2.

The adhesions shall take effect sixty days after notification thereof shall have been given to the Netherland Government, and, at the earliest, on the expiration of the period contemplated in the preceding paragraph.

The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts at any time after the deposit of the ratifications or of the notification of the adhesions. In such cases, the period fixed in Article 28, paragraph 2, shall only be reckoned from the date when the Convention comes into force as regards Powers which have ratified or adhered.

Article 55

The present Convention shall remain in force for twelve years from the time it comes into force, as determined by Article 54, paragraph 1, even in the case of Powers which adhere subsequently.

It shall be renewed tacitly from six years to six years unless denounced.

Denunciation must be notified, at least one year before the expiration of

each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other contracting Powers.

Denunciation shall only take effect in regard to the Power which has notified it. The Convention shall remain in force in the case of the other contracting Powers, provided that their participation in the appointment of judges is sufficient to allow of the composition of the Court with nine judges and nine deputy judges.

ARTICLE 56

In case the present Convention is not in operation as regards all the Powers referred to in Article 15 and the annexed table, the Administrative Council shall draw up a list on the lines of that article and table of the judges and deputy judges through whom the contracting Powers will share in the composition of the Court. The times allotted by the said table to judges who are summoned to sit in rota will be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the judges of the Court in each year shall be the same. If the number of deputy judges is greater than that of the judges, the number of the latter can be completed by deputy judges chosen by lot among those Powers which do not nominate a judge.

The list drawn up in this way by the Administrative Council shall be notified to the contracting Powers. It shall be revised when the number of these Powers is modified as the result of adhesions or denunciations.

The change resulting from an adhesion is not made until the first of January after the date on which the adhesion takes effect, unless the adhering Power is a belligerent Power, in which case it can ask to be at once represented in the Court, the provision of Article 16 being, moreover, applicable if necessary.

When the total number of judges is less than eleven, seven judges form a quorum.

[1105] ARTICLE 57

Two years before the expiration of each period referred to in paragraph 2 of Article 55 each contracting Power can demand a modification of the provisions of Article 15 and of the annexed table, relative to its participation in the operation of the Court. The demand shall be addressed to the Administrative Council, which will examine it and submit to all the Powers proposals as to the measures to be adopted. The Powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, and at least one year and thirty days before the expiration of the said period of two years, communicated to the Power which made the demand.

When necessary, the modifications adopted by the Powers shall come into force from the commencement of the fresh period.

Done at The Hague . . . . . nineteen hundred and seven, in a single original, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the contracting Powers.

(*Here follow signatures*).

[1106]

DISTRIBUTION OF JUDGES AND DEPUTY JUDGES BY COUNTRIES FOR EACH YEAR FOR THE PERIOD OF SIX YEARS

Judges	*Deputy Judges*	*Judges*	*Deputy Judges*
First Year		*Second Year*	
1 Argentine Rep.	Paraguay	Argentine Rep.	Panama
2 Colombia	Bolivia	Spain	Spain
3 Spain	Spain	Greece	Roumania
4 Greece	Roumania	Norway	Sweden
5 Norway	Sweden	Netherlands	Belgium
6 Netherlands	Belgium	Turkey	Luxemburg
7 Turkey	Persia	Uruguay	Costa Rica
Third Year		*Fourth Year*	
1 Brazil	Dominican Rep.	Brazil	Guatemala
2 China	Turkey	China	Turkey
3 Spain	Portugal	Spain	Portugal
4 Netherlands	Switzerland	Peru	Honduras
5 Roumania	Greece	Roumania	Greece
6 Sweden	Denmark	Sweden	Denmark
7 Venezuela	Haiti	Switzerland	Netherlands
Fifth Year		*Sixth Year*	
1 Belgium	Netherlands	Belgium	Netherlands
2 Bulgaria	Montenegro	Chile	Salvador
3 Chile	Nicaragua	Denmark	Norway
4 Denmark	Norway	Mexico	Ecuador
5 Mexico	Cuba	Portugal	Spain
6 Persia	China	Serbia	Bulgaria
7 Portugal	Spain	Siam	China

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